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Supreme Court, U.S.
FILED

No. 02 277 AUG 13 2002

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IN THE

Supreme Court of the United States

JAMES K. HAVEMAN, JR., Director of the State of Michigan, Department of Community Health,

Petitioner,

v

WESTSIDE MOTHERS, a Michigan Welfare Rights Organization, *et al.*

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

This suit filed under 42 USC § 1983 alleges that officials of the state of Michigan have failed to provide eligible Medicaid recipients in Michigan with Early and Periodic Screening, Diagnostic, and Treatment (EPSDT) services as defined in Title XIX of the Social Security Act, 42 USC § 1396 *et seq*.

1. Does sovereign immunity bar a suit by private individuals and organizations against state officials for alleged violations of a federal statute enacted under the Spending Clause of the United States Constitution, Art 1, § 8?

2. Does 42 USC § 1983 create a private cause of action available to enforce the EPSDT provisions of Title XIX of the Social Security Act, 42 USC § 1396 *et seq*?

3. Do organizations representing doctors and dentists have standing to sue state officials for alleged violations of Title XIX of the Social Security Act, arising out of the State's administration of the EPSDT provisions of Title XIX of the Social Security Act?

PARTIES TO THE PROCEEDING IN THE COURT OF APPEALS

Appellants in the Court of Appeals were: Westside Mothers, Families On The Move, Inc., American Academy Of Pediatrics, American Academy Of Pediatric Dentists, M.B., by her next friend Tricia G., B.K., by her next friend Lois Ann K., D.J., by her next friend Tangela W., DN. J., by her next friend Tangela W., DM. J., by his next friend Tangela W., K.K., by her next friend Vicki K., K.T., by her next friend Veda T., J.T., by his next friend Veda T.

Appellees in the Court of Appeals were: James K. Haveman, Jr., Director of the State of Michigan Department of Community Health, Robert Smedes, Deputy Director of the Medical Services Administration. Robert Smedes, Deputy Director of the Medical Services Administrator, has been omitted from the caption of the case because he is no longer a state official and the agency within the Michigan Department of Community Health referred to as the Medical Services Administration no longer exists.

The United States of America participated as an Intervenor at the request of the Court of Appeals.

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The opinion of the Court of Appeals (App 1a) is reported at 289 F3d 852. The March 26, 2001 opinion of the District Court dismissing all remaining claims (App 21a) is reported at 133 F Supp 2d 549. The December 28, 1999 order of the District Court dismissing organizational respondents for lack of standing (App 98a) is unreported.

JURISDICTION

The Court of Appeals entered judgment on May 15, 2002. App 1a. The jurisdiction of this Court is invoked under 28 USC § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

The following constitutional provisions statutes and regulations appear in the Appendix, included *infra*, at the pages noted in the table of contents.

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STATEMENT OF THE CASE

Respondents filed this lawsuit on July 12, 1999, claiming a cause of action under 42 USC § 1983 and federal jurisdiction under 28 USC § 1331. Respondents (eight Medicaid recipients under age 21 and six organizations) allege that Petitioners James Haveman and Robert Smedes, in their official capacities as Director and Deputy Director of the Michigan Department of Community Health (DCH)[1], deny certain medical benefits to children under the state's Medical Assistance (Medicaid) program, in violation of Title XIX of the Social Security Act, 42 USC § 1396 *et seq.* (Medicaid Act). Respondents claim that they have a federal cause of action against the Petitioner under 42 USC § 1983 for prospective injunctive relief to enforce their asserted rights under Title XIX. (App 146a)

Medicaid is a jointly funded federal-state program established by Congress for the purpose of "enabling each State, as far as practicable under conditions in such State," to furnish medical assistance and other related services to indigent individuals. States participate in the Medicaid program through

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[1] Robert Smedes is no longer employed by the State of Michigan and his position, Deputy Director for Medical Services Administration, no longer exists.

"state plans" which are submitted to, and approved by, the Secretary of the U.S. Department of Health and Human Services (HHS). 42 USC § 1396. Specifically, Respondents allege that the Petitioner denies Early and Periodic Screening, Diagnostic, and Treatment (EPSDT) services to Medicaid recipients. EPSDT is a group of specific services defined under 42 USC § 1396a(a)(43) and 1396d(r), available to Medicaid recipients under age 21.

Respondents also claim that the "managed care" program administered by Petitioner causes Medicaid recipients to be denied EPSDT services. Under 42 USC § 1396u-2(a), states may "require an individual who is eligible for Medicaid under the state plan . . . to enroll with a managed care entity as a condition of receiving such assistance," so long as certain specified conditions are met. A managed care entity "provides or arranges for services for enrollees under a contract [with the state] pursuant to [42 USC 1396b(m)]." Managed care entities, also referred to as health maintenance organizations (HMOs) and managed care organizations (MCOs), will be referred to in this petition as MCOs. All of the named Respondents were enrolled in MCOs.

Respondents' Complaint consists of five counts: (1) denial of EPSDT screening to Medicaid recipients; (2) denial of EPSDT treatment to Medicaid recipients; (3) denial of EPSDT outreach and information; (4) denial of transportation and scheduling assistance under the EPSDT program; and (5) failure to secure capacity to deliver EPSDT services. Respondents seek injunctive relief "prohibiting [Petitioner] from violating the rights of [Medicaid recipients] as complained of [in their Complaint] and requiring them to take such actions as are necessary to remedy their past violations." They also request appointment of "a Special Master . . . to oversee [Petitioner's] compliance . . . ."

On November 9, 1999, Petitioner filed a motion for judgment on the pleadings and/or summary judgment against the individual Respondents on the grounds: that Respondents failed to allege any facts establishing that they were injured by any violation of the Medicaid Act; that Respondents lacked standing; that the statutes and regulations Respondents relied on did not create a private cause of action under 42 USC § 1983 in accordance with *Blessing v Freestone*, 520 US 329 (1997); that in the absence of allegations that Petitioner's policies or procedures violated a specific provision of the Social Security Act, Respondents failed to state a claim; and that based on accompanying affidavits and exhibits, there were no material issues of fact as to whether Petitioner was in violation of the Medicaid Act. Petitioner also filed a motion for judgment on the pleadings against the organizational Respondents on the grounds that those Respondents lacked standing. On December 21, 1999, the District Court issued an order dismissing Respondents' transportation claim. The Respondents did not appeal this ruling. On December 28, 1999, the District Court issued an order granting Petitioner's motion to dismiss all organizational Respondents except Westside Mothers and Families on the Move, finding that these Respondents had met the "factors for associational standing at the pleadings stage." (App 110a)

The District Court issued its opinion on March 26, 2001, granting judgment to Petitioner on all remaining claims, on the basis that sovereign immunity bars Respondents' claims and that 42 USC § 1983 afforded no private cause of action for challenging the administration of federal programs adopted under the Constitution's Spending Clause. The District Court did not address any of the grounds for dismissal raised by Petitioner in his motion for judgment on the pleadings and/or summary judgment.

Respondents appealed to the Sixth Circuit Court of Appeals on April 4, 2001. On May 15, 2002, the Court of Ap-

peals issued its judgment and opinion, reversing the District Court's March 26, 2001 judgment dismissing Respondents' claims and reversing the District Court's December 28, 1999 order dismissing the American Academy of Pediatrics and the American Academy of Pediatric Dentists on standing grounds.

REASONS FOR GRANTING THE WRIT

The District Court in this case properly held that Respondents' claims were barred by the Eleventh Amendment and that Respondents could not rely on *Ex parte Young*, 209 US 123 (1908), as a basis for jurisdiction over defendant state officers, acting in their official capacities.

The District Court concluded that *Young*, does not provide a basis for jurisdiction over state officers in this case: because Respondents allege a violation of Spending Clause legislation which is not "supreme law of the land"; because Respondents' claims are contractual in nature and that *Young* does not apply to breach of contract claims; because Respondents have alleged no *ultra vires* acts by Petitioner; because the duties Respondents seek to enforce are discretionary; and because the Medicaid Act provides its own detailed remedies. Alternatively, the District Court concluded that Respondents' claims should be dismissed on the grounds that 42 USC § 1983 does not create a private right of action for enforcement of federal programs enacted under the Spending Clause, unless the substantive legislation clearly creates such a right. There is no such clear statement in the Medicaid Act.

Although this Court has not squarely addressed these issues, several of the Court's recent decisions concerning the scope of the Eleventh Amendment and 42 USC § 1983 support the District Court's conclusions. The Sixth Circuit Court of Appeals disagreed. These important questions of federal law and State-Federal relationships should be settled by the Court.

Additionally, assuming *arguendo* that 42 USC § 1983 ever authorizes a private cause of action for enforcement of Spending Clause legislation, the Court of Appeals decision conflicts with this Court's ruling in *Blessing v Freestone*, 520 US 329 (1997), in finding that Respondents adequately pled an enforceable cause of action for relief under 42 USC § 1983. The Sixth Circuit's incorrect application of *Blessing* becomes more apparent in light of this Court's most recent decision in *Gonzaga University v Doe*, ___ US ___ ; 122 S Ct 2268 (2002). The Court of Appeals also misapplied *Blessing* and ignored other relevant precedent of this Court when it reversed the District Court and found that associations of dentists and doctors had standing to litigate Respondents' claims that children were being denied Medicaid EPSDT services in violation of the federal Medicaid statute.

I. *EX PARTE YOUNG* DOES NOT OVERRIDE THE STATE'S IMMUNITY IN THIS CASE.

The *Ex parte Young* doctrine permits prospective injunctive relief against state officers in ***certain*** circumstances when the state itself would be immune from suit. But, "courts have not read *Young* expansively." *Children's Health Care Is A Legal Duty, Inc. v Deters*, 92 F3d 1412, 1415 (6th Cir 1996). See also, *Pennhurst State School and Hospital v Halderman (Pennhurst II)*, 465 US 89, 102-103 (1984), and *Idaho v Coeur d'Alene Tribe of Idaho*, 521 US 261, 270, 278-280 (1997). *Young* is based on the legal fiction that where a state officer's authority to act is in conflict with federal law, "he is . . . stripped of his official . . . character and is subjected in his person to the consequences of his individual conduct," because "[t]he state has no power to impart to him any immunity from responsibility to the supreme authority of the United States." 209 US 123 at 160.

The District Court based its decision regarding Eleventh Amendment immunity on five separate and independent

grounds, any one of which, standing alone, supports dismissal of Respondents' claims.

A. Legislation enacted under the Spending Clause is not the supreme law of the land.

The District Court noted that the "fiction" of *Ex parte Young* was created to "give life to the Supremacy Clause." 133 F Supp 2d 549 at 560, citing *Green v Mansour*, 474 US 64, 68 (1985). (App 38a-39a.) *Young* provides a remedy to end a continuing violation of federal law if such federal law is the supreme law of the land. *Id.* However, as the District Court emphasized, neither *Ex parte Young* nor the numerous Supreme Court cases applying it have directly analyzed whether all federal laws are to be considered supreme for purposes of applying the doctrine.

The Constitution grants Congress the power to "lay and collect Taxes, Duties, Imposts and Excises to . . . provide for the . . . general Welfare of the United States." US Const, Art I, § 8. Incident to this power, "Congress may attach conditions on the receipt of federal funds, and has repeatedly employed the power to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives." *South Dakota v Dole*, 483 US 203, 206 (1987). The Medicaid program was enacted pursuant to Congress's spending power, to provide "federal financial assistance to States that choose to reimburse certain costs of medical treatment for needy persons." *Harris v McRae*, 448 US 297, 301 (1980).

The District Court below reasoned that because the requirements of legislation enacted under the Spending Clause are not binding upon the states, except where mutually agreed to in the form of a contract between the state and the federal government, Spending Clause legislation cannot be considered supreme law of the land. 133 F Supp 2d at 561-562. (App

40a-44a.) This analysis finds support in other cases. In *Brogdon v National Health Care Corp*, 103 F Supp 2d 1322 (ND Ga 2000), another district court held that Spending Clause legislation like the Medicaid Act cannot preempt state laws, because legislation enacted under the Spending Clause is not the supreme law of the land:

> To be sure, the States must comply with Medicaid . . . participation requirements in order to continue to receive federal funds. But the authority to require compliance with participation standards is derived not from the primacy of federal law enacted pursuant to an enumerated power but from the terms of a contract and the agreement to abide by those terms in return for the receipt of federal moneys. [*Id.* at 1399.]

Justice Burger expressed a similar view in a concurring opinion in *Townsend v Swank*, 404 US 282 at 292 (1971):

> [I]t seems appropriate to keep clearly in mind that Title IV of the Social Security Act governs the dispensation of federal funds and that it does no more than that. True, Congress has used the "power of the purse" to force the States to adhere to its wishes to a certain extent; but adherence to the provisions of Title IV is in no way mandatory upon the States under the Supremacy Clause . . . .

If, as the foregoing analysis suggests, Spending Clause legislation such as the Medicaid Act is not supreme law, the *Ex parte Young* doctrine, which flows from the Supremacy Clause is not available to circumvent the state's Eleventh Amendment immunity.

B. ***Ex parte Young* does not apply to claims based on breach of contract.**

Participation by the states in federal-state grant programs such as Medicaid is voluntary and "the States are given the choice of complying with the conditions set forth in the Act or foregoing the benefits of federal funding." *Pennhurst State School and Hospital v Halderman (Pennhurst I)*, 451 US 1, 11 (1981). Under 42 USC § 1396, "If a State agrees to establish a Medicaid plan that satisfies the requirements of Title XIX, . . . the Federal Government agrees to pay a specified percentage of 'the total amount expended . . . as medical assistance under the State plan'." *Harris v McRae, supra,* at 308. "The sums made available under this section shall be used for making payments to States which have submitted, and have approved by the Secretary, State plans for medical assistance." 42 USC § 1396. 42 USC § 1396a(a) sets forth the elements that a state must include in its state plan in order to obtain the approval of the HHS Secretary to participate in the Medicaid program, and the right to receive federal funding. EPSDT services are included under 42 USC § 1396a(a)(43).

42 USC § 1396c sets forth actions that the federal government may take if it finds that a state's Medicaid plan no longer complies with the provision of § 1396a, or that there is a failure to substantially comply with any provision of § 1396a. Under this provision, the federal government may withhold federal funds from substantially noncompliant states, but cannot compel compliance with any given state plan requirement.

In *Pennhurst I, supra*, at 17, the Supreme Court stated that "legislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the states agree to comply with federally imposed conditions. The legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the 'contract'." The District

Court correctly concluded that the relationship between the state and federal government under Spending Clause programs is one of contract. The relationship is no less a contract simply because many of the terms agreed upon originate in federal statute.

The Eleventh Amendment is a jurisdictional bar to suits brought against a state by its own citizens, where the state has not consented to suit. *Kimel v Florida Board of Regents*, 120 528 US 62, 75 (2000). Michigan has not waived its immunity in this case. Furthermore, since the Medicaid Act contains no clear condition requiring a state to waive its Eleventh Amendment immunity, participation in the program cannot be construed as a waiver. Congress may impose conditions on the states under federal spending programs, but where it does so, "it must do so unambiguously." *Pennhurst I, supra,* at 17; *Suter v Artist M*, 503 US 347, 356 (1992).

If there is federal jurisdiction in this matter, it is only through the application of the *Ex parte Young* doctrine. However, as noted above, "the theory of *Young* has not been provided an expansive interpretation." *Pennhurst State School and Hospital v Halderman (Pennhurst II), supra* at 103. In this regard, the District Court below explained that under *In re Ayers*, 123 US 443 (1887), state officials were ***not*** stripped of their Eleventh Amendment immunity when a claim against a state official sought specific performance of a contract. That is precisely what Respondents were seeking in this lawsuit. *Ayers* held that in such actions, the state itself is the only real party-in-interest and the federal court has no jurisdiction to proceed against the state officer. Therefore, plaintiffs could not avoid the bar of sovereign immunity by naming the state officers as defendants. *Id.* at 490-492, 497-498. *Ayers* was discussed at length and relied upon in *Young* and was reaffirmed recently in *Idaho v Coeur d'Alene Tribe of Idaho*, 521 US 261 (1997) and *Alden v Maine*, 527 US 706 (1999).

In light of the contractual nature of Spending Clause programs and the long-standing prohibition against applying *Ex parte Young* to contractual claims, the Court of Appeals erred in overriding the state's sovereign immunity in this case.

C. ***Ex parte Young* does not apply where, as here, Respondents have not alleged *ultra vires* acts by Petitioner.**

Ex parte Young applies, if at all, where it is alleged that an action by a state officer violates federal law. In such case, the officer is said to be acting *ultra vires* and is not protected by the state's sovereign immunity. This Court in *Pennhurst II, supra*, at 101-102, 114, n. 11 and n. 25, emphasized that "the authority-stripping theory of *Young* . . . has been narrowly construed" and applies only when a state officer acts without any valid authority whatever.

In this case, Respondents did not allege any act ***by Petitioner*** that violated federal law and therefore would strip Petitioner of immunity. The purely conclusory statements in the Complaint that Petitioner had violated various provisions of the Medicaid Act did not identify ***what*** the Petitioner had allegedly done that violated federal law. Respondents alleged that they had not received certain medical services. But nowhere did Respondents allege any specific unlawful acts by Petitioner that had supposedly caused their deprivation. Therefore, the District Court correctly held that *Ex parte Young* did not deprive Petitioner of sovereign immunity because Respondents had not alleged the requisite *ultra vires* acts by Petitioner.

As noted by the District Court below, "the test of whether sovereign immunity is overridden under *Young* 'turns on ***whether the defendant state official was empowered to do what he did***, i.e., whether, even if he acted erroneously, it was within the scope of his authority'." (Emphasis added), 133 F Supp 2d at 569, citing *Pennhurst II, supra*, at 111-113, n 22.

This Court has explicitly rejected the theory that "an officer given the power to make decisions is only given the power to make correct decisions. . . . [A]n officer might make errors and still be acting within the scope of his authority." *Pennhurst II, supra*, at 112, n 22. Similarly, an allegation that a state official has performed a statutory duty "inadequately" is also not sufficient to establish that the official was acting *ultra vires*. *Pennhurst II, supra,* at 101, n 11.

As noted above, in the instant case, Respondents did not identify in their pleadings ***what*** the Petitioner had allegedly done that violated federal law. Their Complaint contains only unconnected allegations that the Respondents had not received certain medical treatment, and then unsupported, conclusory allegations that the Petitioner had violated certain enumerated sections of the Medicaid Act. In other words, the Respondents have not identified what the Petitioner had done that is supposedly outside of the scope of his legal authority to administer the Medicaid program.

If Respondents had identified in their pleadings a policy adopted by Petitioner that was in conflict with the Social Security Act, or a practice knowingly endorsed by the Petitioner that directly violated the Social Security Act, it might be argued that Petitioner was acting *ultra vires* and, therefore, could be "stripped of his authority" for immunity purposes under *Ex parte Young*. But Respondents clearly did not do so. At best, Respondents' allegations amount to a claim that someone was not carrying out Petitioner's policies as well as they should be. This is far from a claim that ***Petitioner*** acted without legal authority in administering the Medicaid program, a necessary element of the *Young* doctrine. Furthermore, under *Rizzo v Goode*, 423 US 362 (1976) and *Monell v Department of Social Services*, 436 US 658 (1978), state officials cannot be held vicariously liable for the wrongdoing of an agent.

Respondents cannot avoid the bar of sovereign immunity simply by pleading so broadly and so vaguely. If it were sufficient to simply plead that a state officer was violating a federal statute, every plaintiff could easily circumvent Eleventh Amendment immunity. This Court has made it clear that *Ex parte Young* is not to be applied so loosely: "The real interests served by the Eleventh Amendment are not to be sacrificed to elementary mechanics of captions and pleadings. Application of the *Young* doctrine must reflect a proper understanding of its role in our federal system . . . instead of a reflexive reliance on an obvious fiction." *Idaho v Coeur d'Alene Tribe of Idaho, supra*, at 270.

D. *Ex parte Young* does not apply to discretionary duties of state officers.

This Court in *Ex parte Young*, *supra*, at 158-159, unequivocally held that federal courts cannot control a state officer's exercise of discretion and that *Young* can only be applied to enforce ministerial duties. Courts "can only direct affirmative action where the officer having some duty to perform not involving discretion, but merely ministerial in its nature, refuses or neglects to take such action. In that case the court can direct the defendant to perform this merely ministerial duty." *Id.* at 158. The federal Medicaid statute contains both discretionary and ministerial components. For example, it may be argued that the duty to include health screening services as a component of covered benefits under the state's EPSDT program is ministerial. However, the manner in which the policy is implemented, and implementation of any other details not spelled out in statute, are clearly discretionary functions.

Respondents have ***not*** pled that Petitioner failed to include mandatory elements from the EPSDT statute as covered benefits under the state's Medicaid program. To the contrary, Respondents specifically pled in their Complaint that Petitioner

did include such coverage as part of the state's Medicaid program:

> 40. The rights and responsibilities of participating MCOs and enrolled Medical Assistance beneficiaries are set forth in contracts between the MCO and the State and between the MCO and its participating 'network' of providers. . . . [T]he contracts list the package of benefits that the MCO is required to provide to Medical Assistance beneficiaries . . . . Medical Assistance's EPSDT services, including outreach and transportation assistance, are included among the services for which the MCOs receive capitated payment. [App 164a].

There are no allegations in Respondents' Complaint that ***Petitioner*** denied any EPSDT services requested by Respondents. (App 145a-176a). Thus, Respondents' Complaint does not raise any factual claim that Petitioner failed to meet any of the ministerial requirements of the EPSDT statute: it is not challenged that Petitioner had in place an EPSDT program that covered each of the elements enumerated in 42 USC § 1396a(a)(43) and § 1396d(r). What Respondents complained about, however, was not whether these services were covered, but ***how well*** the program was working. See e.g. Complaint, ¶¶ 37-39, App 163a-164a. Respondents claimed that because Medicaid providers and MCOs were allegedly not ***delivering*** the service sufficiently, Petitioner must be ordered to do something (unspecified by Respondents) to improve performance. The fact that Respondents seek to control the state's discretionary actions is reflected in their requested relief: to have the District Court appoint a master to superintend Petitioner's management of the EPSDT program. (Complaint, App 175a)

Beyond defining the minimum elements each Medicaid program must contain, the administration of the program is left

to the discretion of participating states. *Alexander v Choate*, 469 US 297, 307 (1985). The relief sought by Respondents in this case would supplant the Petitioner's discretion. As the District Court below correctly held, 133 F Supp 2d at 574:

> This court's review of the statutes and regulations upon which plaintiffs' complaint relies as the basis for Messrs. Haveman's and Smedes' purported wrongdoing informs it that their responsibilities 'involve the paradigmatic exercise of discretion.' *Wisconsin Bell*, 57 F.Supp.2d at 713. That is, even if Michigan were obligated to provide all of the services plaintiffs argue are required . . . the federal laws upon which plaintiffs rely do not explain how those levels of service are to be reached, nor do those federal laws require that the State provide service in a particular manner. Moreover, even if the responsible state officials are obligated to accomplish the purportedly federally-mandated goals, plaintiffs point this court to no statutes or regulations that deny those decision makers 'the character of judgment or discretion' in determining how to get there. *United States, ex rel. Girard Trust Co. v Helvering*, 301 U.S. 540, 543-44, 57 S.Ct. 855, 81 L.Ed. 1272 (1937).

E. *Ex parte Young* does not apply where the statutory scheme provides its own detailed remedies.

Seminole Tribe of Florida v Florida, 517 US 44, 74 (1996), provides that where Congress has prescribed a detailed remedial scheme for enforcement of rights under a substantive statute, federal courts should not afford an additional remedy against state officers based on *Ex parte Young*:

> Where Congress has created a remedial scheme for the enforcement of a particular federal right, we have, in suits against federal officers, refused to supplement that scheme with one created by the judiciary. *Schweiker v. Chilicky*, 487 U.S. 412, 423, 108 S.Ct. 2460, 2468, 101 L.Ed.2d 370 (1988) ('When the design of a Government program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its administration, we have not created additional ... remedies'). Here, of course, the question is not whether a remedy should be created, but instead is whether the Eleventh Amendment bar should be lifted, as it was in *Ex parte Young*, in order to allow a suit against a state officer. Nevertheless, we think that the same general principle applies: Therefore, where Congress has prescribed a detailed remedial scheme for the enforcement against a State of a statutorily created right, a court should hesitate before casting aside those limitations and permitting an action against a state officer based upon *Ex parte Young*.

The District Court found that the federal funding reduction/cutoff mechanism established under 42 USC § 1396c was the type of limiting remedial enforcement provision that precluded it from exercising jurisdiction under *Ex parte Young* to consider more extensive remedial measures. 133 F Supp 2d at 575. (App 68a-69a.)

In fact, the remedial scheme created under the Medicaid Act is considerably more detailed than is described in the District Court's decision and consists of several inter-related remedies. In addition to the funding reduction remedy of 42

USC § 1396c, 42 USC § 1396a(a)(3) requires states participating in the Medicaid program to "provide for granting an opportunity for a fair hearing before the State agency to any individual whose claim for medical assistance under the plan is denied or is not acted upon with reasonable promptness." These hearing requirements have been fleshed out in considerable detail in the regulations promulgated under the Act. See 42 CFR 431.220-250. For example, 42 CFR 431.220 requires states to grant hearings to any Medicaid applicant whose claim for services has been denied or not acted upon with reasonable promptness and to any recipient who believes the agency has taken action erroneously. Under 42 CFR 431.230, if a Medicaid recipient makes a timely request for a hearing, in most cases, the state may not terminate or reduce services until after the hearing decision is rendered. 42 CFR 431.240 specifies details for conducting the hearing. 42 CFR 431.241 specifies matters to be considered at the hearing. 42 CFR 431.242 specifies the procedural rights of the recipient including, *inter alia*, the right to examine the content of the case file and all documents and records prior to hearing, the right to bring witnesses and present facts and argument without interference, and the right to refute any evidence and to cross-examine adverse witnesses. 42 CFR 431.244 specifies that hearing decisions must be based exclusively on the evidence introduced at the hearing. Final administrative action must be taken within 90 days from the date of the request for a hearing. Under 42 CFR 431.245, the recipient must be notified in writing of the decision and any right to seek judicial review provided under state law.[2] Under 42 CFR 431.246, a state agency must promptly make corrective payments, retroactive to the date of incorrect action if the hearing decision is favorable to the recipient. Through these detailed administrative remedies and subsequent judicial review Medicaid recipients have a more

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[2] In Michigan, judicial review of such decision is provided pursuant to MCL 400.37.

than adequate means of addressing any alleged violation of the Medicaid Act.

42 USC § 1396u-2(b)(4) provides additional remedial procedures for Medicaid recipients enrolled in managed care organizations. All of the individual plaintiffs in this case were enrolled in MCOs, as are approximately 75% of the EPSDT population. Under § 1396u-2(b)(4), Medicaid MCOs are required to "establish an internal grievance procedure under which an enrollee who is eligible for medical assistance under the State plan under this title . . . may challenge the denial of coverage or of payment for such assistance." Additionally, under 42 USC § 1396b(m)(5)(A), HHS may take action directly against a participating MCO if the Secretary determines that the entity has substantially failed to provide Medicaid services. Under this section, the Secretary may impose civil money penalties upon the MCO and/or deny payment to the state for medical assistance furnished under the contract.

The foregoing procedures, considered together, comprise an extensive and detailed complementary remedial scheme created for the benefit of Medicaid recipients. Under *Seminole Tribe, supra*, courts should refrain from also affording additional remedies under *Ex parte Young* where, as here, the Medicaid statute contains several interrelated detailed remedies for Medicaid recipients who have been denied rights or services under the Medicaid Act.

II. 42 USC § 1983 CREATES NO PRIVATE CAUSE OF ACTION FOR NONCOMPLIANCE WITH THE MEDICAID ACT.

A. 42 USC § 1983 creates no private cause of action for beneficiaries of Spending Clause legislation.

42 USC § 1983 imposes liability on anyone who, under color of state law, deprives a person of any right "secured by

the Constitution and laws." However, not every federal statute creates a "right" enforceable under § 1983. *Blessing v Freestone*, at 340. In a concurring opinion in *Blessing*, Justice Scalia questioned whether § 1983 "ever authorizes beneficiaries of a federal-state funding and spending agreement . . . to bring suit." *Id.* at 349. He pointed out that under contract law as it existed in 1871 when § 1983 was enacted, a "third party beneficiary was generally regarded as a stranger to the contract and could not sue upon it." *Id.*

Although current law allows a third-party beneficiary to bring suit to enforce a beneficial interest in a contract, "the rights of donee beneficiaries were not clearly established until *Seaver v Ransom* (1918)." K. Teeven, *A History of the Anglo-American Common Law of Contract* 230 (1990). When § 1983 was enacted, it was widely maintained "that a person for whose benefit a promise was made, if not related to the promisee, could not sue upon the promise." C. Langdell, A *Summary of the Law of Contracts* 79 (2d ed. 1880). This rule followed from the widely accepted understanding that "[a] binding promise vests in the promisee, and in him alone, a right to compel performance of the promise." *Id.* "As between the plaintiff and defendant, there must be a privity of contract, and if the plaintiff be a mere stranger to the consideration, and no promise be made by the defendant to him, founded in privity upon it, the action is not maintainable by him, although a promise have been made by the defendant to pay the plaintiff." W. Story, *A Treatise on the Law of Contracts Not Under Seal* 83 (1844). It was also clear that a private party's interest in a ***state's*** contract did not, at that time, afford a judicially enforceable right. See *In re Ayers, supra*.

As established above, Michigan's participation in the Medicaid program is based upon a contract between the state and the federal government: Michigan submits its state plan to HHS, containing its promises to provide payment for certain medical services to indigent individuals, and in exchange HHS

approves the plan and agrees to pay for a share of such services. Medicaid recipients are, at best, third party beneficiaries of the services covered under the contract. They would be "donee" beneficiaries, as compared to creditor beneficiaries, because they provide no consideration for the promises offered and are owed no pre-existing duty by the promisee.

In considering the extent to which § 1983 afforded individuals a private cause of action against the state, the Supreme Court in *Will v Michigan Department of State Police*, 491 US 58, 67 (1989) held that "in enacting § 1983 Congress did not intend to overrule well-established immunities or defenses under the common law." The Supreme Court also concluded that the members of the Congress who enacted § 1983 "were familiar with common-law principles . . . and that they likely intended these common-law principle to obtain, absent specific provisions to the contrary." *Id.* at 67. If § 1983 was intended to abrogate the traditional common-law defense that third party beneficiaries could not sue the promisor for breach of the promise, it was incumbent upon Congress to make this intent clear:

> The language of § 1983 also falls far short of satisfying the ordinary rule of statutory construction that if Congress intends to alter the "usual constitutional balance between the States and the Federal Government," it must make its intention to do so "unmistakably clear in the language of the statute." . . . Congress should make its intention "clear and manifest" if it intends to pre-empt the historic powers of the States, . . . or if it intends to impose a condition on the grant of federal moneys . . . "In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the criti-

cal matters involved in the judicial decision." [*Id* at 65.]

Several other Supreme Court cases also emphasize the requirement that where Congress intends to impose duties or liabilities on the states which limit their Eleventh Amendment immunity, it must do so unambiguously, making its intentions unmistakably clear in the language of the statute. See *e.g.*, *South Dakota v Dole*, 483 US 203, 207 (1987); *Seminole Tribe, supra* at 55-56 and 59; *Kimmel v Florida Board of Regents*, 528 US 62, 73-74 (2000); *Atascadero State Hospital v Scanlon*, 473 US 234, 242 (1985); *Pennhurst State School & Hospital v Halderman*, 451 US 1, 17 (1981) (*Pennhurst I*)

Congress has never made it "clear and manifest" that its intent in enacting § 1983 was to abrogate the defense, available to all parties at common law, that a party could not be sued for violating a contractual promise by one who was not party to the agreement, where the third party was not owed a pre-existing duty by the promisee. Contrary to Respondents' argument below, Congress's silence on this issue during the years since § 1983 was enacted cannot be deemed a "clear and manifest" expression of Congressional intent. The role of the courts is to interpret the legislative intent at the time the statute was enacted. *Central Bank of Denver v First Interstate Bank of Denver*, 511 US 164, 186-187 (1994); *United States v Wise*, 370 US 405, 411(1962). The inaction of ***subsequent*** Congresses is not evidence of what the Congress that enacted § 1983 intended. *Alexander v Sandoval*, 532 US 275, 292-293 (2001).

Since Congress did not, through the enactment of § 1983, abrogate the states' defense against suit by third party beneficiaries, and since the Medicaid Act creates no right directly, Respondents have no cause of action against the state for enforcement of any provision of Title XIX. *Maine v Thiboutot*, 448 US 1, 6 (1980).

B. **Respondents have no private right of action under the EPSDT provisions of the Medicaid Act.**

The Court of Appeals in this case misapplied this Court's decision in *Blessing v Freestone, supra*, when it summarily concluded that Respondents have a private right of action for alleged noncompliance with the screening and treatment provisions of the Medicaid Act. App 16a-18a. This Court's subsequent decision in *Gonzaga University v Doe*, 536 US ____; 122 S Ct 2268 (2002), makes it even clearer that the Court of Appeals erred in finding that a private cause of action exists in this case.

In *Blessing,* this Court articulated a 3-prong test for guiding courts in determining whether a federal statute creates a privately enforceable right:[3]

> First, Congress must have intended that the provision in question benefit the plaintiff. . . . Second, the plaintiff must demonstrate that the right assertedly protected by the statute is not so "vague and amorphous" that its enforcement would strain judicial competence. . . .Third, the statute must unambiguously impose a binding obligation on the States. In other words, the provision giving rise to the asserted right must be couched in mandatory rather than precatory terms. [520 US at 340-341.]

However, both *Blessing* and *Gonzaga* clarify that under the first prong, it is not sufficient simply to find that a statute was intended by Congress to benefit putative plaintiffs. "[I]t is

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[3] As noted in Part II. A., *supra*, *Blessing* did not reach the question whether § 1983 ever affords a private right of action for claimed violations of Spending Clause programs.

rights, not the broader or vaguer 'benefits' or 'interests' that may be enforced under [§ 1983]." *Gonzaga,* Slip Op at 8. To the extent that Congress intends to confer an enforceable right upon individuals, "it must make its intentions to do so unmistakably clear in the language of that statute." *Gonzaga,* Slip Op at 11, quoting *Will v Michigan Department of State Police, supra*. In this case, the specific statutory language at issue creates no such enforceable rights in the Respondents.

1. Respondents' screening, treatment and notice claims (First, Second and Third claims)

42 USC § 1396 authorizes the expenditure of federal funds for the purpose of enabling states to furnish "medical assistance" to needy individuals within the state. Federal Medicaid funds are made available to states that have submitted state plans to HHS and have received HHS approval of their plans. 42 USC § 1396a(a) specifies what must be included in every state plan. 42 USC § 1396a(a)(43) specifies that a state plan must provide for informing all eligible Medicaid recipients of the availability of EPSDT services, for providing or arranging for the provision of screening services when requested, and arranging for (directly or through referral) corrective treatment of conditions diagnosed through the screening. 42 USC § 1396d(r)(1) defines the items and services included within the term EPSDT.

The foregoing statutory provisions simply require states to include the specified EPSDT elements in their state plans as a condition of state plan approval by HHS. Nothing in these provisions speaks unequivocally or otherwise to any rights of Medicaid recipients. As such, the statutory language at issue focuses on the state and its relationship with HHS, not on the Medicaid recipient. As explained in *Alexander v Sandoval, supra*, at 289 (2001), and reiterated in *Gonzaga*, Slip Op at 13, "statutes that focus on the person regulated rather than the in-

dividuals protected create 'no implication of an intent to confer rights on a particular class of persons'."

Blessing, supra, also requires that a court look at the ***specific*** rights claimed by Respondents to be created under the statute. In *Blessing,* the Court rejected an undifferentiated finding that "Title IV-D creates enforceable rights in families in need of Title IV-D services." 520 US at 342. This Court rejected this approach because it "did not specify exactly which 'rights' it was purporting to recognize, but . . . apparently believed that federal law gives respondents the right to have the state substantially comply with Title IV-D in all respects." *Id.* The Court emphasized that

> it was incumbent upon respondents to identify with particularity the rights they claimed, since it is impossible to determine whether Title IV-D, as an undifferentiated whole, gives rise to undefined 'rights.' Only when the complaint is broken down into manageable analytic bites can a court ascertain whether such separate claims satisfy the various criteria we have set forth for determining whether a federal statute creates rights. [*Id.*]

Blessing emphasized that many provisions in funding statutes "are designed only to guide the state in structuring its system-wide efforts . . . . These provisions may ultimately benefit individuals who are eligible for . . . services, but only indirectly." 520 US 329, 344. In this regard, Respondents do ***not*** allege that Michigan's state plan fails to include any of the required EPSDT elements set forth in 42 USC § 1396a(a)(43) or § 1396d(r). See Complaint, ¶¶ 37-49 which contain all of Respondents factual allegations as to what Petitioner had allegedly done or not done in administering their EPSDT program. App 163a-167a. Respondents' only allegations as to Petitioner's actions are that Petitioner submitted statistics to HHS

reflecting that Petitioner failed to meet an 80% participation goal set by HHS under 42 USC § 1396d(r), and that such fact, if true, affords Respondents a right of action to require Petitioner to improve his performance and guarantee that all eligible Medicaid recipients receive EPSDT services (whether they request them or not).

The very fact that 42 USC § 1396d(r) directs HHS to set a yearly ***goal*** of something less than 100% for EPSDT participation establishes that Congress did ***not*** intend Medicaid recipients to have individual enforceable rights under EPSDT provisions of the Medicaid Act. The right of action claimed here is very similar to the one rejected in *Blessing* in which this Court held that a statutory provision which imposed a numerical "substantial compliance" requirement on a state was ***not*** intended to benefit any given individual and, therefore, did not create a privately enforceable federal right.

In *Blessing*, several individuals sued state officials for allegedly failing to provide child support services under Title IV-D of the Social Security Act, claiming that they had an enforceable individual right to have the state's program achieve "substantial compliance with the requirements of the act." 520 US at 332-333. Under Title IV-A, if a state does not "substantially comply" with the requirements of Title IV-D, HHS is authorized to reduce federal funding to the state. *Id.* at 335. By regulation, HHS defined substantial compliance as 90% compliance with certain criteria and 75% compliance with other criteria. In holding that the foregoing requirements were not intended to benefit individual recipients, the Court stated:

> Far from creating an individual entitlement to services, the standard is simply a yardstick for the Secretary to measure the systemwide performance of a State's Title IV-D program. Thus, the Secretary must look to the aggregate services provided by the State, not to whether

> the needs of any particular person have been satisfied. [*Id.* at 343.]

This Court explained that where a federal statute does not require 100% compliance, it cannot be concluded that any individual plaintiff is entitled to be within the percentage of individuals for whom compliance is compelled:

> It is clear, then, that even when a State is in "substantial compliance" with Title IV-D, any individual plaintiff might still be among the 10 or 25 percent of person whose needs ultimately go unmet. Moreover, even upon a finding of substantial noncompliance, the Secretary can merely reduce the State's AFDC grant by up to five percent; she cannot, by force of her own authority, command the State to take any particular action or to provide any services to certain individuals. In short, the substantial compliance standard is designed simply to trigger penalty provisions that increase the frequency of audits and reduce the State's AFDC grant by a maximum of five percent. As such, it does not give rise to individual rights. [*Id.* at 344.]

In *Gonzaga*, the Court concluded that the Title IV-D provisions at issue in *Blessing* focus on "the aggregate services provided by the State, rather than the 'needs of any particular person'. . . ." Slip Op at 7. As such, the statute confers no individual rights that can be enforced by § 1983. *Id* The same conclusion applies to the Title XIX Medicaid provisions at issue here. Indeed, in a just-issued decision, the Fifth Circuit Court of Appeals reached this very conclusion in another EPSDT case. See *Frazar v Ladd*, _____ F3d _____, 2002 US App LEXIS 14885, Slip Op pp 34-50 (5th Cir 2002).

2. Respondents' claim for assistance in scheduling appointments (Fourth Claim).

Respondents allege under their fourth claim that Petitioner has failed to provide EPSDT-eligible Medicaid recipients with assistance in scheduling medical appointments (they have not alleged that any plaintiff ever asked for such assistance) and that Respondents have a right of action to compel Petitioner to ensure that every recipient is offered such assistance. However, the Medicaid Act contains no requirement for providing scheduling assistance to EPSDT recipients. Any such requirements are contained only in regulations under 42 CFR 441.62 and have no counterpart in statute.

This Court's decision in *Alexander v Sandoval*, *supra*, forecloses any reliance on federal regulations to support a private cause of action under 42 USC § 1983, where the regulatory requirement is not included in the statute it implements, or where the statute itself does not explicitly create a private cause of action to enforce regulations promulgated under the statute. *Id* at 285-287. For this reason, as well as the reasons set forth in part II.B.1., Respondents have no right of action under their fourth claim, either.

3. Respondents' claim regarding capacity to deliver EPSDT services (Fifth Claim)

Respondents claim that Petitioner's Medicaid managed care program lacked the capacity necessary to deliver adequate medical care to EPSDT-eligible children in violation of 42 USC § 1396u-2(b)(5). This statute provides that the "***managed care organization*** shall provide the State and the Secretary [of HHS] with adequate assurances (in a time and manner determined by the Secretary) that the organization" has the capacity to serve the expected enrollment.

Thus, it is the MCO, ***not the state***, that has the obligation to act under this provision. Under *Blessing, Alexander*, and *Gonzaga*, statutes directing some other entity to take action do not impose a duty upon the state that a private citizen can enforce against the state. For this reason, as well as the reasons stated in Part II.B.1., above, Respondents have no private right of action to enforce 42 USC § 1396u-2(b)(5).

III. THE AMERICAN ACADEMY OF PEDIATRICS AND AMERICAN ACADEMY OF PEDIATRIC DENTISTS LACK STANDING.

Respondents American Academy of Pediatrics (AAP) and American Academy of Pediatric Dentists (AAPD) alleged only that they are organizations representing doctors and dentists, respectively, that they promote policies that increase access to health care for low-income children, that they seek to assure that eligible children receive EPSDT services, and that the "unlawful acts and omissions of [Petitioner] have imposed otherwise unnecessary expenditures of organizational resources upon [each of them]." Complaint, ¶¶ 15, 16, App 153a-154a. These Respondents plead no violation of any rights or statutes on behalf of their members. They seek no relief on their own behalf or on behalf of any of their members.

Article III, § 2 of the Constitution confines the federal courts to deciding actual cases or controversies. *Allen v Wright*, 468 US 737 (1984). A central component of the Article III case or controversy requirement is that the litigant must have standing before it can invoke the jurisdiction of the federal court. *Id.* There are three constitutional requirements to achieving standing: 1) an injury in fact, defined as an invasion of a legally protected interest which is concrete, particularized and actual or imminent, not conjectural or hypothetical, 2) a causal connection between the injury and the complained of conduct of the defendant, and 3) likelihood that plaintiff's injury will be redressed by a remedy of the court. *Lujan v De-*

fenders of Wildlife, 504 US 555 (1992). This is referred to as "constitutional" standing.

In order to have constitutional standing, a plaintiff must have suffered actual harm which resulted from the challenged action. In the absence of such harm, no "case or controversy" exists between the parties. *Simon v Eastern Kentucky Welfare Rights Organization*, 426 US 26 (1976). The injury must be fairly traceable to the challenged action of the Petitioner and not the result of the independent action of some third party. *Lujan v Defenders of Wildlife, supra* at 560. The allegation of injury must be concrete and factual, not speculative. *Id.* A federal lawsuit is not a "forum for the airing of interested onlookers' concerns, nor an arena for public-policy debates." *Valley Forge Christian College v Americans United for Separation of Church and State, Inc.*, 454 US 464 (1982). "The federal courts were simply not constituted as ombudsmen of the general welfare." *Id.* The central requirement for standing is that the Respondents or one of its members has suffered personal injury as a result of Petitioner's error, and not just a generalized complaint about the way the government conducts its affairs. *Id.* It is clear from Respondents' Complaint that under these standards AAP and AAPD did not meet the minimal constitutional requirements for standing.

To have standing, an organization must also establish that it meets "prudential" requirements for standing. *Warth v Seldin*, 422 US 490 (1975). The District Court below found it unnecessary to consider the constitutional requirements for standing, having found that AAP and AAPD clearly lacked "prudential" standing. (App 107a-110a) Specifically, the District Court correctly found that AAP and AAPD did not assert their own legal rights, but rather sought to assert claims intended to benefit Medicaid recipients, not Medicaid providers such as themselves. Respondents' Complaint pleaded the following claims: (1) denial of EPSDT screening, (2) denial of EPSDT treatment, (3) denial of child health care outreach and

information, (4) failure to provide transportation and scheduling assistance, and (5) failure to secure capacity to deliver EPSDT services. None of these claims refers to any rights or benefits of medical providers. Further, all of the substantive relief sought in the Complaint was for the benefit of Medicaid recipients. See Complaint, p 30 (R.1, Apx 46).

While the District Court below would also have been correct to find that AAP and AAPD lacked constitutional standing as well, there is no question that these Respondents lacked prudential standing and that the Court of Appeals erred in reversing the District Court's dismissal on standing grounds. See also, *Blessing v Freestone, supra,* at 341-345.

CONCLUSION

This case raises important questions of federal law and State-Federal relationships that should be settled by this Court. The petition for a writ of certiorari should be granted.

Respectfully submitted.

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August, 2002

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RECOMMENDED FOR FULL-TEXT PUBLICATION

Pursuant to Sixth Circuit Rule 206

ELECTRONIC CITATION: 2002 FED App. 0172P (6th Cir.)

File Name: 02a0172p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

Westside Mothers, a Michigan Welfare Rights Organization; Michigan League for Human Services, Inc.; Families On the Move, Inc.; American Academy of Pediatrics; American Academy of Pediatric Dentists; B.K., by her next friend Lois Ann K.; D.J., by her next friend Tangela W.; Dn.J., by her next friend Tangela W.; Dm.J., by his next friend Tangela W.; K.K., by her next friend Vicki K.; K.T., by her next friend Veda T.; J.T., by his next friend Veda T.,	No. 01-1494

Plaintiffs-Appellants, *v.* James K. Haveman, Jr., Director of the State of Michigan Department of Community Health; Robert Smedes, Deputy Director of the Medical Services Administration, *Defendants-Appellees,* United States of America, *Intervenor.*	

Appeal from the United States District Court

for the Eastern District of Michigan at Detroit.

No. 99-73442--Robert H. Cleland, District Judge.

Argued: January 24, 2002

Decided and Filed: May 15, 2002

Before: MERRITT, BOGGS, and MOORE, Circuit Judges.

COUNSEL

ARGUED: Jennifer R. Clarke, DECHERT, PRICE & RHOADS, Philadelphia, Pennsylvania, Thomas K. Gilhool, PUBLIC INTEREST LAW CENTER OF PHILADELPHIA, Philadelphia, Pennsylvania, for Appellants. Erica Weiss Marsden, OFFICE OF THE ATTORNEY GENERAL, Lansing, Michigan, for Appellees. Alisa B. Klein, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Intervenor. **ON BRIEF:** Jennifer R. Clarke, Kelly L. Darr, Robin P. Sumner, Jacob I. Kobrick, DECHERT, PRICE & RHOADS, Philadelphia, Pennsylvania, Thomas K. Gilhool, PUBLIC INTEREST LAW CENTER OF PHILADELPHIA, Philadelphia, Pennsylvania, Marilyn T. Mullane, MICHIGAN LEGAL SERVICES, Detroit, Michigan, Lourdes A. Rivera, NATIONAL HEALTH LAW PROGRAM, INC., Los Angeles, California, Susan K. McParland, MICHIGAN ASSOCIATION FOR CHILDREN, Southfield, Michigan, Martha Jane Perkins, NATIONAL HEALTH LAW PROGRAM, Chapel Hill, North Carolina, for Appellants. Erica Weiss Marsden, OFFICE OF THE ATTORNEY GENERAL, Lansing, Michigan, for Appellees. Alisa B. Klein, Mark B. Stern, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Intervenor. David T. Goldberg, DAVID T. GOLDBERG LAW OFFICE, New York, New York, Drew S. Days III, MORRISON & FOERSTER, Washington, D.C., Erwin Chemerinsky, Los Angeles, California, Fordham E. Huffman, Chad A. Readler, JONES, DAY, REAVIS & POGUE, Columbus, Ohio, James L. Feldesman, FELDESMAN, TUCKER, LEIFER, FIDELL & BANK LLP, Washington, D.C., Larry S. Gage, Barbara D.A. Eyman, Charles Luband, Aimee N. Wall, POWELL, GOLDSTEIN, FRAZER & MURPHY, Washington, D.C., Phyllis James, CITY OF DETROIT LAW DEPARTMENT, Detroit, Michigan, Richard Clayton Trotter, TEXAS JUSTICE FOUNDATION, San Antonio, Texas, Patrick W. Beatty, Rebecca L. Thomas, Robert C. Maier, Darrell M. Pierre, Jr., OFFICE OF THE

ATTORNEY GENERAL, Columbus, Ohio, Timothy P. Heather, BENJAMIN, YOCUM & HEATHER, Cincinnati, Ohio, for Amici Curiae.

OPINION

MERRITT, Circuit Judge. This suit filed under 42 U.S.C. § 1983 alleges that the state of Michigan has failed to provide services required by the Medicaid program. Plaintiffs, Westside Mothers, other advocacy and professional organizations, and eight named individuals allege that defendants James Haveman, director of the Michigan Department of Community Health, and Robert Smedes, deputy director of the Michigan Medical Services Administration, did not provide the early and periodic screening, diagnosis, and treatment services mandated by the Medicaid Act and related laws.

The Medicaid program, created in 1965 when Congress added Title XIX to the Social Security Act, provides a federal subsidy to states that choose to reimburse poor individuals for certain medical care. *See* 42 U.S.C § 1396 *et seq.* (1994 & Supp. 2001) ("Medicaid Act"); *Harris v. McRae*, 448 U.S. 297, 301 (1980). "Although participation in the program is voluntary, participating states must comply with certain requirements imposed by the Act and regulations promulgated by the Secretary of Health and Human Services." *Wilder v. Virginia Hosp. Assoc.*, 496 U.S. 498, 502 (1990). Like all other states, Michigan participates in the Medicaid program. Since 1997, operating under a waiver from the Health Care Finance Administration, Michigan has provided eligible residents Medicaid services by requiring them to enroll in Health Maintenance Organizations, which provide medical care in exchange for a flat monthly fee per participant. J.A. at 165-71.

The Medicaid Act and related regulations set out a detailed list of services every state program must provide. *See* 42 U.S.C. § 1396 *et seq.*; 41 C.F.R. §§ 430 *et seq.* (2000). The Act allows the Secretary of Health and Human Services to limit or end payments to a state whose Medicaid program does not provide these services. *See* 42 U.S.C. § 1396c.

At issue here is the federal requirement that participating states provide "early and periodic screening, diagnostic, and treatment services . . . for individuals who are eligible under the plan and are under the age of 21." *Id.* § 1396d(a)(4)(B); *see also id.* § 1396d(r) (defining such services); 41 C.F.R. §§ 441.55-.62 (same). The required services include periodic physical examinations, immunizations, laboratory tests, health education, *see* 42 U.S.C. § 1396d(r)(1), eye examinations, eyeglasses, *see id.* § 1396d(r)(2), teeth maintenance, *see id.* § 1396d(r)(3), diagnosis and treatment of hearing disorders, and hearing aids, *see id.* § 1396d(r)(4).

In 1999, plaintiffs sued the named defendants under § 1983, which creates a cause of action against any person who under color of state law deprives an individual of "any right, privileges, or immunities secured by the Constitution and laws" of the United States. 42 U.S.C. § 1983. They alleged that the defendants had refused or failed to implement the Medicaid Act, its enabling regulations and its policy requirements, by (1) refusing to provide, and not requiring participating HMOs to provide, the comprehensive examinations required by §§ 1396a(a)(43) and 1396d(r)(1) and 42 C.F.R. § 441.57; (2) not requiring participating HMOs to provide the necessary health care, diagnostic services, and treatment required by § 1396d(r)(5); (3) not effectively informing plaintiffs of the existence of the screening and treatment services, as required by § 1396a(a)(43); (4) failing to provide plaintiffs the transportation and scheduling help needed to take advantage of the screening and treatment services, as required by § 1396a(a)(43)(B) and 42 C.F.R. § 441.62; and (5) developing a

Medicaid program which lacks the capacity to deliver to eligible children the care required by §§ 1396(a)(8), 1396a(a)(30)(A), and 1396u-2(b)(5). J.A. 38-46.

Defendants moved to dismiss the plaintiffs and for dismissal of the suit. In 1999, the district court granted defendants' motion to dismiss as plaintiffs four organizations.[1] It dismissed the Michigan League for Human Services and the Michigan Welfare Rights Organization on the grounds that they lacked constitutional standing, and it dismissed the Michigan chapters of the American Academy of Pediatrics and of the American Academy of Pediatric Dentists on the grounds that they lacked prudential standing. It allowed the remaining organizations and individuals to continue as plaintiffs.

In March 2001 the district court granted defendants' motion to dismiss all remaining claims. *See Westside Mothers v. Haveman*, 133 F.Supp.2d 549, 553 (E.D. Mich. 2001). In a detailed and far-reaching opinion, the district court held that Medicaid was only a contract between a state and the federal government, that spending-power programs such as Medicaid were not supreme law of the land, that the court lacked jurisdiction over the case because Michigan was the "real defendant and therefore possess[ed] sovereign immunity against suit," *id.*, that in this case *Ex parte Young* was unavailable to circumvent the state's sovereign immunity, and that even if it were available § 1983 does not create a cause of action available to plaintiffs to enforce the provisions in question.

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[1] In December 1999 the district court also disposed of part of plaintiffs's fourth claim, that Michigan had not provided required transportation assistance, on grounds of *res judicata* and collateral estoppel, finding those issues were addressed in *Boatman v. Hammons*, 164 F.3d 286 (6th Cir. 1998). That ruling is not appealed here.

This appeal followed. We reverse on all issues presented.

Analysis

A. Medicaid Contracts and the Spending Power

Much of the district court's decision rests on its initial determinations that the Medicaid program is only a contract between the state and federal government and that laws passed by Congress pursuant to its power under the Spending Clause are not "supreme law of the land." We address these in turn.

1. Whether Medicaid is only a contract.--The district court held that "the Medicaid program is a contract between Michigan and the Federal government." *Westside Mothers*, 133 F. Supp. 2d at 557. The program, it points out, is not mandatory; states choose whether to participate. *See* 42 U.S.C. § 1396b (empowering the Secretary to pay funds to states that submit Medicaid plans). If a state does choose to participate, Congress may then "condition receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives." *Westside Mothers*, 133 F. Supp. 2d at 556-57 (quoting *South Dakota v. Dole*, 483 U.S. 203, 206 (1987)).

To characterize precisely the legal relationship formed between a state and the federal government when such a program is implemented, the district court turned to two Supreme Court opinions on related subjects. In *Pennhurst State School and Hosp. v. Halderman* ("*Pennhurst I*"), the Court described the Medicaid program as "much in the nature of a contract," and spoke of the "'contract'" formed between the state and the federal government. 451 U.S. 1, 17 (1981) (quotation marks in original). The relevant passage reads in full:

> Unlike legislation enacted under § 5 [of the Fourteenth Amendment], however, legislation enacted pursuant to the spending power is *much in the nature of* a contract: in return for federal funds, the States agree to comply with federally imposed conditions. The legitimacy of Congress's power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of this *"contract."*

Pennhurst I at 17 (emphasis added).

Justice Scalia expanded on this contract analogy in his concurrence in *Blessing v. Freestone*. He maintained that the relationship was "in the nature of a contract" because:

> The state promises to provide certain services to private individuals, in exchange for which the Federal government promises to give the State funds. In contract law, when such an arrangement is made (A promises to pay B money, in exchange for which B promises to provide services to C), the person who receives the benefit of the exchange of promises between two others (C) is called a third-party beneficiary.

520 U.S. 329, 349 (1997) (Scalia, J., concurring).

Drawing on above language, the district judge then concluded that the "Medicaid program is a contract between Michigan and the Federal government," *Westside Mothers*, 133 F.Supp.2d at 557, further describing it as a "contract . . . between sovereigns," and "the Medicaid contract," *id.* at 558. The only significant difference between Medicaid and an ordinary contract, he asserted, is "the sovereign status of the

parties," which limits the available remedies each can seek against the other. *Id.*

Contrary to this narrow characterization, the Court in *Pennhurst I* makes clear that it is using the term "contract" metaphorically, to illuminate certain aspects of the relationship formed between a state and the federal government in a program such as Medicaid. It does not say that Medicaid is *only* a contract. It describes the program as "much in the nature of" a contract, and places the term "contract" in quotation marks when using it alone. *Id.*, 451 U.S. at 17. It did not limit the remedies to common law contract remedies or suggested that normal federal question doctrines do not apply. Justice Scalia's concurrence in *Blessing* does not alter this.

Binding precedent has put the issue to rest. The Supreme Court has held that the conditions imposed by the federal government pursuant to statute upon states participating in Medicaid and similar programs are not merely contract provisions; they are federal laws. In *Bennett v. Kentucky Department of Education*, Kentucky argued that a federal-state grant agreement "should be viewed in the same manner as a bilateral contract." 470 U.S. 656, 669 (1985). The Court rejected this approach, holding that, "[u]nlike normal contractual undertakings, federal grant programs originate in and remain governed by statutory provisions expressing the judgment of Congress concerning desirable public policy." *Id.*; *see also Boatman v. Hammons*, 164 F.3d 286, 288 (6th Cir. 1998) ("States . . . must follow federal law in managing the [Medicaid] program"). The fact that these provisions have the binding force of law means that Medicaid and similar federal grant programs are not subject merely to doctrines of contract interpretation.

2. Whether acts passed under the Spending Power are Supreme Law of the Land.--After holding that Medicaid is only a contract to pay money enacted under the spending power, the

district court then held that programs enacted pursuant to the Constitution's spending power are not the "supreme law of the land" and do not give rise to remedies invoked for the violation of federal statutes. *See Westside Mothers*, 133 F.Supp.2d at 561-62.[2] Relying on its determination that Medicaid and similar programs are "contracts consensually entered into by the States with the Federal Government . . . ," the district court then reasons that they are "not statutory enactments by which States must automatically submit to federal prerogatives." *Id.*, 133 F.Supp.2d at 561. There are two ways to understand this passage. One is that the district court is merely following the logic of its previous finding, and holding that federal-state programs are not supreme law because they are only contracts. We have already rejected the line of reasoning that begins with the assumption that Medicare is only a contract.

The district court may also be claiming that acts passed under the spending power are not supreme law because the spending power only gives Congress the power to set up these programs, not to force states to participate in them. *See id.* at 561-62. A state can decline to participate in Medicaid. *See id.* at 562. "Because congressional enactments pursuant to the Spending Power that set forth the terms of federal-state cooperative agreements depend on the voluntary agreement of participating States . . . ," the district court concludes, they are

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[2] The Supremacy Clause states that the "Constitution and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every state shall be bound thereby, any Thing in the Constitution or the Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, § 2. Congress's spending powers derive from the Spending Clause, which gives it "Power to lay and collect Taxes . . . [to] provide for the common Defense and general Welfare of the United States." U.S. Const. art. I, § 8.

"not within the ambit of the Supremacy Clause [and so] are not the supreme law of the land." *Id.* It erroneously states that its conclusion is dictated "by the [Supreme] Court's holdings in *Alden*, *Prinz*, *New York*, *South Dakota*, and *Pennhurst I*." *Id.* *Alden v. Maine* holds that sovereign immunity prevents the federal government from forcing unconsenting states to submit to suit in their own courts. *See* 527 U.S. 706 (1999). Both *Prinz v. United States*, 521 U.S. 898 (1997), and *New York v. United States*, 505 U.S. 144 (1992), hold that Congress violates the Tenth Amendment if it compels a state to enact legislation or implement a specific regulatory scheme. *South Dakota* upholds the power of Congress to place conditions on a state's receipt of federal funds. 483 U.S. at 211-12. *Pennhurst I* holds that if Congress wishes to impose obligations on states that choose to participate in volitional spending power programs, it must make the obligations explicit. 451 U.S. at 25.

In *Townsend v. Swank*, we do find language by Chief Justice Burger in a one-paragraph concurrence to a unanimous opinion that laws passed under the spending power are "in no way mandatory on the states." 404 U.S. 282, 292 (1971) (Burger, C.J., concurring in the result). The Chief Justice appeared merely to be noting that the Supremacy Clause does not compel states to participate in programs enacted under the spending power. *See Quern v. Mandley*, 436 U.S. 725, 734 (1978) (citing Burger's concurrence to support the proposition that while "federal eligibility standards are mandatory on states that adopt [a program enacted under the spending clause, the law] in no way obligates a state to continue that program"). This concurrence does not establish that spending power enactments are not supreme law of the land. *See O'Brien v. Massachusetts Bay Trans. Auth.*, 162 F.3d 40, 43 n.2 (1st Cir. 1998) (noting that "individual Justices have from time to time suggested that the authority for adhering to Federal law when Congress employs its spending power is not to be located in the Supremacy Clause. But these moments have been few and far between and . . . have not debilitated the general conclusion

that laws of a jurisdiction that receives federal funds must, when a relevant conflict looms, give way to Federal law").

The district court acknowledges that "the Supreme Court has in the past held that federal-state cooperative programs enacted under the Spending Power fall within the ambit of the Supremacy Clause." *Westside Mothers*, 133 F.Supp.2d at 561 (citing *Blum v. Bacon*, 457 U.S. 132 (1982), *Carleson v. Remillard*, 406 U.S. 598 (1972), *Townsend*, 404 U.S. 282). It then states that in "recent years . . . the Supreme Court has conducted a more searching analysis of the nature and extent of the Supremacy Clause," suggesting erroneously that its departure from precedent is dictated by recent Supreme Court jurisprudence. *Id.* The Court has recently held that, when a state agency accepts federal funds appropriated under the spending clause, the supremacy clause requires conflicting local law to yield. *See Dalton v. Little Rock Family Planning Servs.*, 516 U.S. 474, 477-78 (1996) (stating that a provision of a state constitution is invalid if it conflicts with the Medicaid Act); *accord CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 663-64 (1993); *Lawrence County v. Lead-Deadwood Sch. Dist. No. 40-1*, 469 U.S. 256, 269-70 (1985). The well-established principle that acts passed under Congress's spending power are supreme law has not been abandoned in recent decisions.

Our court has followed these decisions. *See, e.g., Planned Parenthood Affiliates of Mich. v. Engler*, 73 F.3d 634, 637 (6th Cir. 1996) (striking down a provision of Michigan law as conflicting with the Medicaid Act). We have found no decision by any other federal circuit court of appeals to the contrary. We reaffirm well-established precedent holding that laws validly passed by Congress under its spending powers are supreme law of the land.

B. Whether the suit is barred under sovereign immunity

The district court next held that the plaintiffs' suit is foreclosed by doctrines of sovereign immunity because

Michigan is the "real party at interest" in the suit and plaintiffs cannot invoke any of the exceptions to sovereign immunity that would allow their suit. *Westside Mothers*, 133 F.Supp.2d at 559-60.

As explained by the Supreme Court in many cases, sovereign immunity, though partially codified in the Eleventh Amendment, is a basic feature of our federal system. *See, e.g., Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 72-73 (1996). There are exceptions. Congress may abrogate a State's immunity from suit under § 5 of the Fourteenth Amendment or a state may consent to suit. *See College Savings Bank v. Florida Prepaid Postsecondary Educ. Expenses Bd.*, 527 US. 666, 670 (1999). None of the exceptions that allow an individual to sue a state directly are at issue here, however. Though the record is not entirely clear, it appears that plaintiffs at first sued the named defendants under § 1983, and only when the district court expressed skepticism about this avenue of attack did they invoke *Ex parte Young* as an alternative mechanism to reach the defendants. *See Westside Mothers*, 133 F.Supp.2d at 575-76. Because sovereign immunity limits the jurisdiction of the Federal courts, we address it before turning to § 1983.

Under the doctrine developed in *Ex parte Young* and its progeny, a suit that claims that a state official's actions violate the constitution or federal law is not deemed a suit against the state, and so barred by sovereign immunity, so long as the state official is the named defendant and the relief sought is only equitable and prospective. *See* 209 U.S. 123 (1908); *see also, e.g., Will v. Michigan Dept. of State Police*, 491 U.S. 58, 71 (1989). "Since *Ex parte Young* . . . it has been settled that the Eleventh Amendment provides no shield for a state official confronted by a claim that he had deprived another of a federal right under the color of state law." *Hafer v. Melo*, 502 U.S. 21, 30 (1990) (citation omitted).

Of course, *Ex parte Young* is a "fiction" to the extent it sharply distinguishes between a state and an officer acting on behalf of the state, but it is a necessary fiction, required to maintain the balance of power between state and federal governments. "The availability of prospective relief of the sort awarded in *Ex parte Young* gives life to the Supremacy Clause." *Coeur d'Alene*, 521 U.S. at 293 (quoting *Green v. Mansour*, 474 U.S. at 68). When a court addresses a claim made under *Ex parte Young* it should simply ask "whether a complainant alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Id.* at 296 (O'Connor, J., concurring). On its surface this case fits squarely within *Ex parte Young*. Plaintiffs allege an ongoing violation of federal law, the Medicaid Act, and seek prospective equitable relief, an injunction ordering the named state officials henceforth to comply with the law.

The district court nonetheless held that *Ex parte Young* was inapplicable for four separate reasons. Two can be quickly dismissed. First, it held that plaintiffs could not invoke *Ex parte Young* because that doctrine can only be invoked to enforce federal laws that are supreme law of the land. *See Westside Mothers*, 133 F.Supp.2d at 561-62. Since we held above that spending clause enactments are supreme law of the land, they may be the basis for an *Ex parte Young* action. Second, the district court held *Ex parte Young* is unavailable because under this doctrine a court lacks "authority to compel state officers performing discretionary functions." *Id.* at 574. This correctly states the holding in *Young*, but misunderstands what it means by "discretion." "An injunction to prevent [a state official] from doing that which he has no legal right to do is not an interference with the discretion of an officer." *Ex parte Young*, 209 U.S. at 159 (quoted in *Telespectrum, Inc. v. Public Service Com'n of Ky.*, 227 F.3d 414, 422 (6th Cir. 2000)). Since the plaintiffs here claim that the defendants are acting unlawfully in refusing to implement mandatory elements of Medicaid's screening and treatment program, they

seek only to prevent the defendants from doing "what [they] have no legal right to do," and their suit is permitted under *Ex parte Young*.

Third, the district court asserts that *Ex parte Young* is unavailable because the state "is the real party in interest when its officers act within their lawful authority." *Westside Mothers*, 133 F.Supp.2d at 562. It has two reasons for finding Michigan the real party in interest. Its first reason follows from its finding that Medicaid is a contract. If Medicaid were only a contract, then this would be a suit seeking to compel a state to specific performance of a contract. Such suits are barred under a nineteenth century Supreme Court case, *In re Ayers*, 123 U.S. 443 (1887), which held that a "claim for injunctive relief against state officials under the Contracts Clause is barred by state sovereign immunity because the state [is] the real party at interest." *In re Ellett*, 254 F.3d 1135, 1145 (9th Cir. 2001) (explicating *In re Ayers*). We have already held that Medicaid is not merely a contract, but a federal statute. This suit seeks only to compel state officials to follow federal law, and thus is not barred by *Ayers*.

The district court also says erroneously that Michigan is the real party in interest because "[t]here is no personal, unlawful behavior attributed" to the defendants that plaintiffs seek to enjoin. *Westside Mothers*, 133 F.Supp.2d at 570. In their initial complaint, plaintiffs make clear that they are suing the named defendants because of "their failure to provide children in Michigan . . . with essential medical, dental, and mental health services *as required by federal law*." J.A. at 18 (emphasis added).

Finally, the district court refused to allow plaintiffs to proceed under *Young* because of the Supreme Court's holding in *Seminole Tribe* that "[w]here Congress has prescribed a detailed remedial scheme for the enforcement against a State of a statutorily created right, a court should hesitate before casting

aside those limitations and permitting an action against a state officer based upon *Ex parte Young*." 517 U.S. at 74. The Medicaid Act allows the Secretary of Health and Human Services to reduce or cut off funding to states that do not comply with the program's requirements. *See Westside Mothers*, 133 F.Supp.2d at 575. This one provision, the district court held, was a detailed remedial scheme sufficient to make *Ex parte Young* unavailable. *See id.*

We disagree. In *Seminole Tribe*, the Supreme Court found *Ex parte Young* was unavailable because Congress had established a "*carefully crafted and intricate* remedial scheme . . . . for the enforcement of a *particular* federal right." 517 U.S. at 73-74 (emphasis added). The mechanism established there included timetables, incentives, and "intricate procedures" to cajole states and Indian tribes to negotiate agreements on gambling. *Id.* at 74. The scheme here, in contrast, simply allows the Secretary to reduce or cut off funds if a state's program does not meet federal requirements. *See* 42 U.S.C. § 1396c. This is not a detailed "remedial" scheme sufficient to show Congress's intent to preempt an action under *Ex parte Young*. *Maryland Psychiatric Soc., Inc. v. Wasserman*, 102 F.3d 717, 719 n* (4th Cir. 1999) (rejecting an assertion that the Medicaid Act's remedial scheme is sufficient to invoke the rule of *Seminole Tribe*).

Plaintiffs seek only prospective injunctive relief from a federal court against state officials for those officials' alleged violations of federal law, and they may proceed under *Ex parte Young*.

C. Whether there is a private right of action under § 1983

Section 1983 imposes liability on anyone who under color of state law deprives a person of "rights, privileges, or immunities" secured by the laws or the constitution of the United States. 42 U.S.C. § 1983. The Supreme Court and this

court have held that in some circumstances a provision of the Medicaid scheme can create a right privately enforceable against state officers through § 1983. *See Wilder*, 496 U.S. at 511-12 (holding that the Boren Amendment to the Medicaid Act created a right enforceable under § 1983); *Audette v. Sullivan*, 19 F.3d 254, 256 (6th Cir. 1994) (applying the test set out in *Wilder* to determine if a particular Medicaid provision creates a right enforceable under § 1983).

In *Blessing*, the Supreme Court set down the framework for evaluating a claim that a statute creates a right privately enforceable against state officers through § 1983. *See* 520 U.S. at 340-41. A statute will be found to create an enforceable right if, after a particularized inquiry, the court concludes (1) the statutory section was intended to benefit the putative plaintiff, (2) it sets a binding obligation on a government unit, rather than merely expressing a congressional preference, and (3) the interests the plaintiff asserts are not so "'vague and amorphous' that [their] enforcement would strain judicial competence." *Id.* at 341 (quoting *Wright v. Roanoke Redevel. and Housing Auth.*, 479 U.S. 418, 437 (1987)). If these conditions are met, we presume the statute creates an enforceable right unless Congress has explicitly or implicitly foreclosed this. *See Blessing*, 520 U.S. at 341; *Wood v. Tompkins*, 33 F.3d 660, 666 (6th Cir. 1994). The district court erred when it did not apply this test to evaluate plaintiffs' claims.

We now apply this test. First, the provisions were clearly intended to benefit the putative plaintiffs, children who are eligible for the screening and treatment services. *See* 42 U.S.C. § 1396a(a)(10)(A). "[I]t is well-settled that Medicaid-eligible children under the age of twenty-one . . . are the intended beneficiaries of the [screening and treatment] provisions." *Dajour B. v. City of New York*, 2001 WL 830674, at *8 (S.D.N.Y. July 23, 2001); *accord Miller v. Whitburn*, 10 F.3d 1315, 1319 (7th Cir. 1993). We have found no federal appellate cases to the contrary. Second, the provisions set a

binding obligation on Michigan. They are couched in mandatory rather than precatory language, stating that Medicaid services "*shall* be furnished" to eligible children, 42 U.S.C. § 1396a(a)(8) (emphasis added), and that the screening and treatment provisions "*must* be provided," *id.* §1396a(a)(10)(A), *see also* 42 C.F.R. § 441.56 (mandatory language). Third, the provisions are not so vague and amorphous as to defeat judicial enforcement, as the statute and regulations carefully detail the specific services to be provided. *See* 42 U.S.C. § 1396d(r). Finally, Congress did not explicitly foreclose recourse to § 1983 in this instance, nor has it established any remedial scheme sufficiently comprehensive to supplant § 1983. *See Blessing*, 520 U.S. at 346-47.

Plaintiffs have a cause of action under § 1983 for alleged noncompliance with the screening and treatment provisions of the Medicaid Act.

D. Other Issues

1. Standing.--In a separate opinion, the district court dismissed as plaintiffs two advocacy organizations, the Michigan League for Human Services and the Michigan Welfare Rights Organization, and two professional organizations, the Michigan chapters of the American Academy of Pediatrics and of the American Academy of Pediatric Dentists. J.A. at 265-81. The Michigan League for Human Services does not appeal the district court's ruling. We address the appeals of the other three organizations.

To have standing a litigant must show (1) some actual or threatened injury, (2) fairly traceable to the defendant's challenged action, which (3) can likely be redressed by a favorable decision. *See Cleveland Surgi-Center, Inc. v. Jones*, 2 F.3d 686, 688 (6th Cir. 1993). "[A]n association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the

interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Natl. Rifle Ass'n v. Magaw*, 132 F.3d 272, 294 (6th Cir. 1997) (citing *Hunt v. Washington Apple Adv't Comm'n*, 432 U.S. 333 (1977)).

The district court held that the Welfare Rights Organization lacked constitutional standing because plaintiffs' complaint contained little information about the organization, leaving the district court unable to determine whether it met the requirements set out above. Plaintiffs' appeal asks us to reverse this holding but provides no facts that would lead us to second-guess the district court's decision. Therefore, we affirm the dismissal of the Michigan Welfare Rights Organization as a plaintiff.

The district court held that the two professional organizations lacked standing because their members could not sue in their own right, since they are not the intended beneficiaries of the Medicare provision in question, 42 U.S.C. § 1396a(a)(30)(A). *See* J.A. at 278-79. Plaintiffs counter that some provisions of the Medicaid act do have medical providers as intended beneficiaries. *See, e.g.*, *Wilder*, 496 U.S. at 509. In *Wilder*, the Supreme Court found that medical providers were intended beneficiaries of the Boren Amendment to the Medicare Act because that "provision establish[ed] a system for reimbursement of providers and is phrased in terms benefitting health care providers." *Id.* Looking to the Medicare provision here, we find similar language. The statute speaks of the need to "assure that payments . . . are sufficient to enlist enough providers." 42 U.S.C. § 1396a(a)(30)(A). The two organizations claim that the defendants have imposed on them "otherwise unnecessary expenditures," meaning that the organizations' members have suffered an injury by not receiving compensation for medical services their members are ethically compelled to provide. *See* J.A. at 24-25. Their

members have (1) alleged an injury-in-fact, limitation of Medicare services that resulted in reduced payments, (2) shown this injury is traceable to defendants' actions, and (3) shown the injury could be redressed through a favorable decision, *see Cleveland Surgi-Center*, 2 F.3d at 688; and the organizations meet the requirements for associational standing. Therefore, we reverse the district court's dismissal of the Michigan chapters of the American Academy of Pediatrics and of the American Academy of Pediatric Dentists as plaintiffs.

2. *Defendant's request for summary judgment.*--Michigan also asks us to affirm the dismissal of the suit even if we disagree with the district court's reasons for dismissing it. *See* Appellees' Br. at 31. It gives numerous grounds apart from those relied on in the district court opinion, claiming *inter alia* that (1) the individual plaintiffs lack standing, (2) the state does provide the screening and treatment services, and (3) the plaintiffs fail to state a claim against Michigan, because plaintiffs allege only that a state contractor failed to provide a service. In support of its requests Michigan provides records, printed materials, flyers, and manuals that, it asserts, support its claims. The defenses raise factual and legal issues not addressed by the district court. We are advised that discovery in this case has been stayed since at least October 26, 1999, some two years ago, and less than three months after the original complaint was filed. We decline to rule on the issues before the district court has made a factual record.

Conclusion

Accordingly we REVERSE the district court's grant of summary judgment to defendants, AFFIRM in part and REVERSE in part the district court's dismissal of organizational plaintiffs for lack of standing, and REMAND the case for further proceedings consistent with this opinion.

WESTSIDE MOTHERS, et al., Plaintiffs, v. JAMES K. HAVEMAN, et al., Defendants.

Case No: 99-CV-73442-DT

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

133 F. Supp. 2d 549

March 26, 2001, Decided

March 26, 2001, Opinion Filed

DISPOSITION:
[**1] Defendants' motion to dismiss granted, Plaintiffs' "Motion for Class Certification" DENIED and Plaintirfs' Complaint DISMISSED WITH PREJUDICE.

COUNSEL:
For PLAINTIFFS: Marilyn T. Mullane/Susan McParland Nash, Michigan Legal Services, Detroit, Michigan.

For PLAINTIFFS: Jennifer Clarke/Jacob Kobrick, Michael Doluisio/Robin Sumner Dechert, Price & Rhoads, Thomas Gilhool, Public Interest Law Center of Philadelphia, Philadelphia, PA.

For PLAINTIFFS: Lourdes Rivera, Jane Perkins, National Health Law Program, Los Angeles, CA.

For DEFENDANTS: Jeffrey S. Sutton, Jones, Day Reavis & Pogue, Columbus, Ohio.

For DEFENDANTS: Howard C. Nielson, Jr., Jones, Day, Reavis & Pogue, Washington, D.C.

JUDGES:
ROBERT H. CLELAND, UNITED STATES DISTRICT JUDGE.

OPINIONBY:
ROBERT H. CLELAND

OPINION:

[*552] OPINION AND ORDER DENYING PLAINTIFFS' MOTION TO CERTIFY CLASS, AND GRANTING DEFENDANTS' MOTION TO DISMISS

I. Introduction

In this case, Plaintiffs' stated goal is to ensure that economically disadvantaged children throughout the State of Michigan obtain adequate medical care. The court can safely say that the endeavor is commendable. Having a virtuous goal in sight, however, does not endow a court with **[**2]** the power to hear a case, nor create a cause of action where none exists. In this case, neither jurisdiction nor a cause of action obtains.

Plaintiffs seek injunctive relief and the appointment of a special master to end the State of Michigan's ("Michigan" or "the State") alleged systemic deprivation of Early and Periodic Screening, Diagnosis, and Treatment Services ("EPSDT services"), which is part of the State's Medicaid or "Medical Assistance" program. The named plaintiffs are two

organizations, n1 Families on the Move and Westside Mothers, and eight putative class representatives. n2 The named defendants are two State officials purportedly responsible for administering Michigan's EPSDT services; however, because the State of Michigan is the entity actually responsible for providing the contested EPSDT services, the court will refer to Michigan as the defendant. Plaintiffs bring their case under *42 U.S.C. § 1983*, claiming that Michigan has failed to provide EPSDT services mandated by *42 U.S.C. § 1396, et seq.*, to the class of all Michigan children eligible for those services.

----------Footnotes----------

n1 The court dismissed four other organizations originally named as plaintiffs for lack of organizational standing on December 28, 1999. **[**3]**

n2 Pending before the court is Plaintiffs' October 14, 1999 "Motion for Class Certification," which will be denied as moot.

----------End Footnotes----------

On November 9, 1999, Michigan moved for dismissal or, alternatively, for summary judgment, which both parties then addressed in written briefs. On December 21, 1999, the court *sua sponte* ordered the parties to further address in briefing certain threshold issues not raised in the initial round of briefing pertaining to the nature of the relationship between the federal government and the State under the Medicaid program, the plaintiffs' standing under § 1983 to bring suit against Michigan, and whether Michigan was legally amenable to suit. A second round of briefing ensued. Finding the State's discussion of these issues to be less than fully satisfactory, the court invited and accepted the participation of the Michigan Municipal League ("the League") as *amicus curiae* to address the issues raised by the court. n3 **[*553]** Based upon the League's participation, a third round of briefing occurred, culminating in a hearing on August 14, 2000. At the hearing,

Michigan adopted [**4] all of the League's arguments as its own, and the court will treat them as such in this order.

----------Footnotes----------

n3 The court commends the efforts by the respective counsel in this case to address the many complex issues raised in this case. Particularly noteworthy for its quality and helpfulness is the *amicus* participation at the court's request of the League and its *pro bono* counsel, Mr. Jeffrey Sutton, of Jones, Day, Reavis and Pogue in Columbus, Ohio, for whose assistance the court here expresses its gratitude.

----------End Footnotes----------

Given the length and complexity of the matters considered, a summary of the Court's opinion is in order. Plaintiffs' suit raises, in essence, two threshold issues that must be addressed before the court may consider the merits of their claims. First, does the court have jurisdiction over this suit, which is directed in substance at the State of Michigan, an entity that is ordinarily immune from suit? Second, even if such jurisdiction exists, is there a cause of action permitting plaintiffs to sue in the State [**5] or its officers in order to enforce the rights asserted? The court's review of these questions indicates that both are to be answered in the negative. The court's analysis is organized as follows:

Part II of this opinion provides an overview of the Medicaid EPSDT program at issue in this litigation. Part III explains the constitutional dimension of the Federal government's and Michigan's relationship under the Medicaid program, and why that relationship is necessarily contractual under the Constitution's Spending Clause. In Part IV, the court explains that it lacks jurisdiction over this case because Michigan is the real defendants, and therefore possesses sovereign immunity against suit. Plaintiffs' attempt to circumvent that immunity under the *Ex parte Young* by suing

Michigan's officers fails for at least four different reasons, each of which is separately explained. Even assuming that *Ex parte Young* was applicable to the instant case, Part V explains that § 1983 does not create a cause of action to sue states or their officers under Spending Power programs, and that the statute also does not operate as an independent means by which sovereign immunity may be overcome if **[**6]** *Ex parte Young* is unavailable. Three distinct reasons concerning the interpretation of § 1983 foreclose its use as envisioned by plaintiffs, and each is discussed in Part V. Plaintiffs' assertions that the court's analyses are foreclosed by prior jurisprudence concerning Spending Clause programs are addressed in Part VI; a handful of other issues are discussed in Part VII; and the court's conclusion is found in Part VIII.

II. Background

The Supreme Court has described the Medicaid program at issue in this litigation:

[It] was created in 1965, when Congress added Title XIX to the Social Security Act, 79 Stat. 343, as amended, *42 U.S.C. § 1396 et seq.* (1976 ed. and Supp. II) for the purpose of providing federal financial assistance to States that choose to reimburse certain costs of medical treatment for needy persons. Although participation in the Medicaid program is entirely optional, once a State elects to participate, it must comply with the requirements of Title XIX.

Harris v. McRae, 448 U.S. 297, 301, 65 L. Ed. 2d 784, 100 S. Ct. 2671 (1980). In other words, a State may either "comply[] with the conditions **[**7]** set forth in the Act or forego[] the benefits of federal funding." *Pennhurst State Sch. and Hosp. v. Halderman, 451 U.S. 1, 11, 67 L. Ed. 2d 694, 101 S. Ct. 1531 (1981)* (internal citations omitted) ("*Pennhurst I*").

The Act creates a "cooperative federal-state program" entitled "Grants to States for Medical Assistance Programs" to

provide statutorily-authorized health care services to economically disadvantaged individuals. *See 42 U.S.C. § 1396 et seq.; Wilder v. Virginia Hospital Ass'n, 496 U.S. 498, 502, 110 L. Ed. 2d 455, 110 S. Ct. 2510 (1990).* If a State elects to participate in the Medicaid program, it must submit to the Secretary of Health and Human Services ("HHS") a state plan describing the scope of its medical assistance program, which will be administered by the State itself. *See 42 U.S.C. § 1396a*(b). Upon approval of the plan, **[*554]** the Secretary allocates financial grants to help defray its cost. *See 42 U.S.C. § 1396b; Harris, 448 U.S. at 308.* Michigan is authorized to participate in the Medicaid program pursuant to § § 105-112e of the **[**8]** Michigan Social Welfare Act, M.C.L. § § 400.105-400.112e. As previously mentioned, once a State agrees to participate in the Medicaid program, the requirements of Title XIX and the regulations promulgated thereunder become mandatory and binding upon the state. *See Wilder, 496 U.S. at 502; Boatman v. Hammons, 164 F.3d 286, 288 (6th Cir. 1998)* (citing *42 C.F.R. § 430.10* and *Harris, 448 U.S. at 301).*

A State's plan must provide "assurance that [it] will be administered in conformity with the specific requirements of Title XIX, the regulations [promulgated thereunder] and other applicable official issuances of [HHS]." *42 C.F.R. § 430.10.* Michigan's "State Plan Under Title XIX of the Social Security Act," includes such assurances of conformity. From time to time, Michigan submits plan amendments to the Secretary, as described at *42 C.F.R. § 430.12(c)*, to reflect changes in law or in the State's operation of its Medicaid program.

The Secretary retains the authority to monitor each participating State's performance, and to terminate or limit payments to the **[**9]** state if the Secretary finds less than substantial compliance with any plan provision:

The Secretary shall notify such State agency that further payments will not be made to the State (or, in his discretion),

that payments will be limited to categories under or parts of the State plan not affected by such failure), until the Secretary is satisfied that there will no longer be any such failure to comply. Until he is so satisfied he shall make no further payments to such State (or shall limit payments to categories under or parts of the State plan not affected by such failure).

42 U.S.C. § 1396c. The parties to the instant case agree that withholding funds from noncompliant states is the exclusive means by which the federal government may enforce the terms of the program, and that the federal government may not compel compliance through litigation. n4 Furthermore, the Medicaid statute contains no provision permitting Medicaid-eligible beneficiaries to bring suit against noncompliant states. There are, however, procedures that grant hearings to individuals who believe that they have been wrongfully denied care. To this end, every Medicaid provider **[**10]** in Michigan must incorporate an internal administrative grievance procedure as a condition of its contract with the State. Moreover, Michigan also maintains an administrative hearing mechanism by which Medicaid-eligible individuals can complain to a county department of social welfare about the quality or level of care provided. *See* M.C.L. § § 400.37, 400.9. Those administrative decisions may be appealed to the county circuit court. *See* M.C.L. § § 400.37.

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n4 The parties have not addressed whether other remedies are available to the federal government, such as administrative recoupment of misspent funds or overpayments.

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Turning to the actual services provided, a State's agreement to participate in the Medicaid program obligates it to provide medical assistance to eligible individuals by paying for part or all of the costs of certain statutorily-enumerated medical

services. *See 42 U.S.C. § § 1396,* 1396d(a). The enumerated services for which the State must pay include EPSDT services, **[**11]** *see 42 U.S.C. § 1396d*(a)(4)(B), which are further defined at *42 U.S.C. § 1396d*(r).

Plaintiffs' detailed, five-count complaint asserts that Michigan has failed, and continues to fail, to meet its mandatory EPSDT obligations under the Medicaid program, as set forth by statute, regulations, and HHS directives. To sum up plaintiffs' complaints, they allege that Michigan has failed to ensure that Medicaid-eligible **[*555]** children in the State receive (1) EPSDT screening services required by *42 U.S.C. § § 1396a*(a)(43) and 1396d(r)(1)(A) and (B), *42 C.F.R. § 441.57*, and various HHS policy directives; (2) EPSDT treatment services required by *42 U.S.C. § 1396d*(r)(5) and 42 C.F.R. pt. 441; (3) basic child health care outreach and information required by *42 U.S.C. § 1396a*(a)(43), *42 C.F.R. § 441.56*, and various HHS policy directives; (4) assistance in scheduling EPSDT services n5 as required by *42 U.S.C. § 1396a*(a)(43)(b) and *42 C.F.R. § 441.62(b)*. Plaintiffs also allege that **[**12]** Michigan has (5) failed to secure capacity to deliver the EPSDT services required by Title XIX as mandated by *42 U.S.C. § § 1396a*(a)(8), 1396a(a)(30)(A) and 1396u-2(b)(5). Because the Medicaid statute itself does not contain a private cause of action, plaintiffs bring their complaint under *42 U.S.C. § 1983,* alleging that the Michigan state officers purportedly responsible for implementing the State's Medicaid program have acted and continue to act under color of state law to deprive plaintiffs of their clearly established rights under the federal Medicaid program.

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n5 The portion of Count IV of plaintiff's complaint concerning Michigan's alleged failure to meet its EPSDT transportation obligation under *42 U.S.C. § 1396a*(a)(43)(b) and *42 C.F.R. § 441.62(a)* was dismissed on December 21, 1999 as barred by collateral estoppel and res judicata.

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III. The Nature of the Relationship Between Michigan and the Federal Government [13] Under the Medicaid Program**

It is a bedrock of constitutional law that the federal government is one of limited and enumerated powers. The Tenth Amendment enshrines this principle, and the Amendment itself reiterates that which is already obvious from the Constitution's structure: "If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States; if a power is an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress." *New York v. United States, 505 U.S. 144, 156, 120 L. Ed. 2d 120, 112 S. Ct. 2408 (1992)* (internal citations omitted). In fact,

the Tenth Amendment "states but a truism that all is retained which has not been surrendered." As Justice Story put it, "this amendment is a mere affirmation of what, upon any just reasoning, is a necessary rule of interpreting the constitution. Being an instrument of limited and enumerated powers, it follows irresistibly, that what is not conferred, is withheld, and belongs to the state authorities." This has been the [Supreme] Court's consistent understanding: **[**14]** "The states unquestionably do retain a significant measure of sovereign authority . . . to the extent that the Constitution has not divested them of their original powers and transferred those powers to the Federal Government."

Id. (internal citations and punctuation omitted).

No constitutional provisions exist that permit the federal government to require States or their officers to become instruments of federal policy. n6 *See Printz v. United States,*

521 U.S. 898, 935, 138 L. Ed. 2d 914, 117 S. Ct. 2365 (1997). "While Congress has substantial powers to govern the Nation directly, including in areas of intimate concern to the States, the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions." *New York, 505 U.S. at 162* (internal citation omitted). As the *Printz* Court explained:

The Framers' experience under the Articles of Confederation had persuaded **[*556]** them that using the States as instruments of federal governance was both ineffectual and provocative of federal-state conflict. Preservation of the States as independent political entities **[**15]** being the price of union, and "the practicality of making laws, with coercive sanctions, for the States as political bodies" having been, in Madison's words, "exploded on all hands," the Framers rejected the concept of a central government that would act upon and through the States, and instead designed a system in which the State and Federal Governments would exercise concurrent authority over the people - who were, in Hamilton's words, "the only proper objects of government." We have set forth the historical record in more detail elsewhere, and need not repeat it here. It suffices to repeat the conclusion: "the Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States." The great innovation of this design was that our citizens would have two political capacities, one state and one federal, each protected from incursion by the other - a legal system unprecedented in form and design, establishing two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it. The Constitution thus contemplates that a State's government **[**16]** will represent and remain accountable to its own citizens. As Madison expressed it: "The local or municipal authorities form distinct and independent portions of the supremacy, no more

subject, within their own spheres, to the general authority than the general authority is subject to them, within its own sphere.

Printz, 521 U.S. at 919-21 (internal citations and punctuation omitted).

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n6 The notable exception to this rule, of course, is state judicial officers, who are expressly obligated under Article VI of the Federal Constitution to uphold federal law. *See Testa v. Katt, 330 U.S. 386, 91 L. Ed. 967, 67 S. Ct. 810 (1947).*

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Accordingly, while Congress can enact programs pursuant to its constitutionally enumerated powers and enforce them through federal officers, it cannot require the States to legislate pursuant to its directions, nor order the States to implement a solution to a congressionally-denoted problem. *See Printz, 521 U.S. at 926* (citing *New York, 505 U.S. at 175-76, 188).* **[**17]** Nor can Congress achieve its otherwise legitimate aims by altogether ignoring State legislatures and dragooning State officers into becoming federal program administrators. *See Printz, 521 U.S. at 928.* However, Congress can, as it has done with the Social Security retirement program, create a federal program implemented through federal officers that directly regulates individual behavior. But it cannot impress the States, either directly or though their officers, into the service of a federal program. n7 Neither party to this case contests these basic propositions.

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n7 Not included within this prohibition is Congress' express power delineated in Article I, Section 8 of the Federal Constitution to call forth the State militias to "execute the

Laws of the Union, suppress Insurrections and repel Invasions."

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Of course, the foregoing strictures do not prevent Congress from acting to influence the States' behavior by means short of outright coercion. One such means, which is indisputably at the core **[**18]** of this litigation, is Congress' ability to use its spending power as an incentive "by which [it] may urge a State to adopt a legislative program consistent with federal interests." *New York, 505 U.S. at 166.* As the Supreme Court has explained:

The Constitution empowers Congress to "lay and collect Taxes, Duties, Imposts, and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States." Art. I, § 8, cl. 1. Incident to this power, Congress may attach conditions on the receipt of federal funds, and has repeatedly employed the power to further broad policy objectives by conditioning receipt of federal moneys upon compliance by **[*557]** the recipient with federal statutory and administrative directives.

South Dakota v. Dole, 483 U.S. 203, 206, 97 L. Ed. 2d 171, 107 S. Ct. 2793 (1987) (internal citations and quotations omitted). In discussing the contours of Congress' authority to legislate pursuant to the spending power, the Court has

long recognized that Congress may fix the terms on which it shall distribute federal money to the States. Unlike legislation enacted under § 5 [of the Fourteenth **[**19]** Amendment], however, legislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions. The legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and

knowingly accepts the terms of the "contract." There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it. Accordingly, if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously. By insisting that Congress speak with a clear voice, we enable the States to exercise their choice knowingly, cognizant of the consequences of their participation.

Pennhurst I, 451 U.S. at 17 (internal citations omitted). The Medicaid program at issue in this litigation is assuredly just such a contract. *See, e.g., Pennhurst I, 451 U.S. at 12-15.*

While Congress possesses no power to order the Michigan legislature or Michigan officials to participate in the Medicaid program, it has offered financial incentives for them to do so. In **[**20]** return for federal funds, Michigan has agreed to adhere to the requirements set forth in federal statutes, regulations, and HHS directives. Justice Scalia's concurrence on this topic in *Blessing v. Freestone, 520 U.S. 329, 137 L. Ed. 2d 569, 117 S. Ct. 1353 (1997)* is illustrative of the legal relationships created under the Medicaid program. There, he explained that federal-state spending power programs are "much in the nature of a contract" because:

The State promises to provide certain services to private individuals, in exchange for which the Federal Government promises to give the State funds. In contract law, when such an arrangement is made (A promises to pay B money, in exchange for which B promises to provides services to C), the person who receives the benefit of the exchange of promises between the two others (C) is called a third party beneficiary.

Blessing, 520 U.S. at 349 (Scalia, J. concurring). In short, the Medicaid program is a contract between Michigan and the Federal Government, and Medicaid recipients are third-party beneficiaries of that contract. However, as the previous excerpt

from *Pennhurst I* makes clear, [**21] all contract requirements must be unambiguous, and Michigan must have accepted them knowingly and voluntarily if there is to be any legally-cognizable expectation that it abide by them.

Plaintiffs ardently object to the characterization of the Medicaid federal-state cooperative agreement as a "contract." They note, correctly, that *Pennhurst I* and its progeny refer to programs enacted pursuant to the spending power as being "in the nature of the contract." The Court's use of such qualified language instead of outrightly referring to such programs as "contracts", they suggest, makes the term merely metaphorical. Plaintiffs posit that:

The Court is employing the poetic devices of analogy and simile to emphasize that, as in contract law, the statute must be clear as to what it requires and that participation by the State is voluntary. *See Pennhurst, 451 U.S. at 17* ("by insisting that Congress speak with a clear voice, we enable the States to exercise their choice knowingly, cognizant [*558] of the consequences of their participation").

(*Pl. Feb. 7, 2000 Br. at 6.)* That such programs are "in the nature of a contract," they argue, suggests that [**22] the Medicaid program is much in the nature of "something else" as well. According to plaintiffs, that "something else" is that the statute in question is a "law," not a mere contract.

But plaintiffs' theory begs the question. No one disputes that the Medicaid program is authorized by federal statute. All laws enacted by Congress, however, are not of equal force. As previously explained, had Congress chosen to impose the Medicaid program directly on the citizenry as it did with the Social Security retirement program, participants could be compelled by law to conform with its strictures. But no such compulsion is available to the federal government when it chooses to act through the States. The participation of each sovereign is purely voluntary; indeed, as plaintiffs point out

through their reliance on *Pennhurst I*, the agreement consists of no more than what the State unambiguously agrees to do. Were the arrangement binding "law" (the connotation presumably being the exercise of federal sovereign power under the Supremacy Clause), and not a contract, there would be no need for the State's participation to be knowingly voluntary.

Because the State's participation in the Medicaid [**23] program is consensual and not compelled by the Constitution, it is contractual in nature. The significant variation from an ordinary contract results from the sovereign status of the parties, which limits the remedies each has against the other. Under ordinary contract law, if the parties to the contract were individuals, A could sue B for specific performance under some circumstances. Under the program at issue in this litigation, both parties agree that the federal government lacks any such power to sue Michigan for specific performance because the Medicaid statute does not provide that remedy. In other words, because the contract is between sovereigns and not individuals, the "contractual nature" of the relationship is more, not less, truncated that it would be in a purely private contract. Recognizing that it is the nature of the participants to this contract that forecloses the availability of certain remedies, the court must examine the Medicaid contract between the Federal Government and Michigan according to its overt terms to determine whether its third-party beneficiaries may sue Michigan for non-performance. n8

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n8 Even assuming, *arguendo*, that the Medicaid program is a "contract" - which plaintiffs do not concede - the parties heavily dispute whether EPSDT-eligible children are third-party beneficiaries to the contract, and even if they are, whether they are properly characterized as "incidental" or "intentional" beneficiaries. For purposes of the analyses in this opinion, the court will assume, without so holding, that they are intentional third-party beneficiaries of the contract.

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[**24]

In all events, it is clear beyond cavil that for the judiciary to enforce against Michigan a federal program requirement that does not meet the *Pennhurst I/South Dakota* criteria would be to do that which the Constitution forbids: namely, conscript a State in furtherance of a federal policy without its consent, on the basis of a constitutionally unenumerated (and therefore nonexistent) congressional power. Congress may not force States into being its agents; Congress may offer incentives for the States to do so long as the requirements of the State's participation are expressly set out. Derivative of the foregoing proposition, and of utmost importance for purposes of this litigation, is the notion that "'the mere receipt of federal funds cannot establish that a State has consented to suit in federal court.'" *Seminole Tribe v. Florida, 517 U.S. 44, 59, 116 S. Ct. 1114, 134 L. Ed. 2d 252* (quoting *Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 246-47, 87 L. Ed. 2d 171, 105 S. Ct. 3142 (1985))*. Recognizing these constitutional constraints, two crucial questions are posed: First, does the Medicaid [*559] program operate to waive Michigan's sovereign immunity as a matter of constitutional law? This issue [**25] will be addressed in Part IV. Second, did Congress unambiguously condition its Medicaid funding contract with Michigan upon the State's consenting to be sued by Medicaid beneficiaries? This issue will be addressed in Part V.

IV. Whether Michigan and/or its Officers Retain Sovereign Immunity From Suit by Private Parties

The Eleventh Amendment to the United States Constitution states:

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or

prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

The Eleventh Amendment is understood "to stand not so much for what it says, but for the presupposition which it confirms." *Kimel v. Florida Bd. Of Regents, 528 U.S. 62, 120 S. Ct. 631, 640, 145 L. Ed. 2d 522 (2000)* (internal citations and punctuation omitted). Put simply, that presupposition is that "the Constitution does not provide for federal jurisdiction over suits against nonconsenting States." *Id.* (internal citations omitted). "Even when the Constitution vests in Congress complete lawmaking authority over **[**26]** a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States." *120 S. Ct. at 643* (internal citations and quotations omitted). In particular, this absence of congressional power applies to the exercise of its enumerated powers under Article I, which means that Congress possesses no authority under Article I "to subject States to suit at the hands of private individuals." *Id.* at 644. Because the Medicaid program at issue in the instant suit is an exercise of Congress' Article I spending power, Congress may not unilaterally subject Michigan to suit by virtue of the State's participation in the program. In other words, participation alone does not connote consent to suit.

However, Michigan's sovereign immunity from suit is not absolute. The Supreme Court has recognized two circumstances in which an individual may sue a State:

First, Congress may authorize such a suit in the exercise of its power to enforce the Fourteenth Amendment - an Amendment enacted after the Eleventh Amendment and specifically designed to alter the federal-state balance. Second, a State may waive its sovereign **[**27]** immunity by consenting to suit.

College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 119 S. Ct. 2219, 2223, 144 L. Ed.

2d 605 (1999) (internal citations omitted). In this case, neither party asserts that Fourteenth Amendment abrogation is implicated. n9

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n9 It is difficult to imagine how it might be, in light of the Supreme Court's apparent holding in *Kimel* that § 5 of the Fourteenth Amendment, at most, grants Congress the authority to abrogate State sovereign immunity only in the areas of racial and gender discrimination. *See Kimel, 120 S. Ct. at 644-46* (holding that § 5 does not grant Congress the power to abrogate sovereign immunity to prevent age discrimination). Even in the absence of Kimel's substantive limitation of § 5, § 5 still would likely be of no aid to plaintiffs. The Court has held that when Congress intends to impose legislation on a state without the state's consent and intrude on traditional state authority, the legislation must contain a specific statement of intent that Congress is acting under its § 5 powers. *See Gregory v. Ashcroft, 501 U.S. 452, 469-70, 115 L. Ed. 2d 410, 111 S. Ct. 2395 (1991)* (citing *Pennhurst I, 451 U.S. at 16* (holding that in the absence of a statement of congressional intent to act under § 5, the Court would assume that Congress was acting solely under the Spending Power)). No such statement of intent in the Medicaid statutes has been brought to the court's attention. Moreover, the issue is not before the court, and will not be addressed here.

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Whether Michigan has consented to suit is a more complicated question. As explained **[*560]** in Part III, *supra*, mere receipt of federal funds alone does not effectuate a waiver, and waiver of sovereign immunity pursuant to the Federal-State Medicaid contract occurs only if that condition is expressly stated as a contractual term. Michigan asserts that it has not waived its immunity here; but plaintiffs posit that

Michigan's acquiescence is irrelevant because plaintiffs sue not the State, but its officers, under the doctrine of *Ex parte Young*.

The *Young* doctrine permits prospective injunctive relief against state officials in certain circumstances, even when the State itself is immune from suit. *See Ex parte Young, 209 U.S. 123, 52 L. Ed. 714, 28 S. Ct. 441 (1908).* As the Supreme Court explained, the doctrine applies in instances where:

an official claims to be acting under the authority of the state. The act to be enforced is unconstitutional; and if it be so, the use of the name of the state to enforce an unconstitutional act to the injury of complainants is a proceeding without the authority of, and one which does not affect, the state in its sovereign **[**29]** or governmental capacity. It is simply an illegal act upon the part of the state official in attempting, by the use of the name of the state, to enforce a legislative enactment which is void because unconstitutional. If the act which the state [official] seeks to enforce be a violation of the Federal Constitution, the officer, in proceeding under such enactment, comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct. The state has no power to impart to him any immunity from responsibility to the supreme authority of the United States.

Id. at 159-60. Although *Young* itself concerned an alleged constitutional violation, the doctrine ordinarily also extends to violations of federal statutory law. *See, e.g., Idaho v. Coeur d' Alene Tribe, 521 U.S. 261, 281, 117 S. Ct. 2028, 138 L. Ed. 2d 438 (1997).*

The *Young* exception to State sovereign immunity is a "legal fiction" "adopted as necessary to permit the federal courts to vindicate federal rights and hold state officials responsible to 'the supreme authority **[**30]** of the United States.'" *Pennhurst State Sch. and Hosp. v. Halderman, 465*

U.S. 89, 102-03, 105, 114 n.25, 79 L. Ed. 2d 67, 104 S. Ct. 900 (1984) ("*Pennhurst II*") (citing *Young, 209 U.S. at 160).* As the Court explained in *Green v. Mansour, 474 U.S. 64, 88 L. Ed. 2d 371, 106 S. Ct. 423 (1985):*

The availability of prospective relief of the sort awarded in *Ex parte Young* gives life to the Supremacy Clause. Remedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law.

Green, 474 U.S. at 68 (internal citations omitted).

In other words, a state officer ostensibly acting under state law that contravenes the Constitution - or congressional enactments that are the supreme law of the land by dint of the Constitution's Supremacy Clause - acts with no lawful authority at all. Where federal law is supreme, the states are powerless to authorize their officials to act in defiance of it. However, the *Young* doctrine is limited in its scope of available relief, and at most may permit a federal court to grant prospective **[**31]** injunctive relief against State officers who are violating supreme federal law. *See Pennhurst II, 465 U.S. at 102-104* (internal citations omitted). Accordingly, the doctrine is available only where plaintiffs can demonstrate not only that a state official is violating federal law, but that the law in question is the supreme law of the land.

In the instant case, the *Ex parte Young* doctrine is inapplicable for at least **[*561]** four reasons, which will be discussed hereafter.

A. Spending Power Programs are Not the Supreme Law of the Land.

The instant case falls outside the ambit of the *Ex parte Young* doctrine because the doctrine does not apply to congressional enactments under the Spending Power. As

described in Part III, supra, such programs are contracts consensually entered into by the States with the Federal Government, and not statutory enactments by which States must automatically submit to federal prerogatives. To be sure, the Supreme Court has in the past held that federal-state cooperative programs enacted under the Spending Power fall within the ambit of the Supremacy Clause. *See, e.g., Blum v. Bacon, 457 U.S. 132, 138, 145-46, 72 L. Ed. 2d 728, 102 S. Ct. 2355 (1982);* **[**32]** *Carleson v. Remillard, 406 U.S. 598, 600, 32 L. Ed. 2d 352, 92 S. Ct. 1932 (1972); Townsend v. Swank, 404 U.S. 282, 285-86, 30 L. Ed. 2d 448, 92 S. Ct. 502 (1971).* In those cases, the Court asserted, without analysis, that the Supremacy Clause amounted to *carte blanch* authority for Congress to invalidate state laws, regardless of the source of the congressional power.

In more recent years, however, the Supreme Court has conducted a more searching analysis of the nature and extent of the Supremacy Clause. n10 In *Alden v. Maine, 527 U.S. 706, 119 S. Ct. 2240, 144 L. Ed. 2d 636 (1999),* the Court analyzed the scope of the Supremacy Clause, and held that:

As is evident from its text . . . the Supremacy Clause enshrines as "the supreme Law of the Land" only those federal Acts that comport with the constitutional design. Appeal to the Supremacy Clause alone merely raises the question whether a law is a valid exercise of the national power. *See* The Federalist No. 33, at 204 (A. Hamilton) ("But it will not follow from this doctrine that acts of the larger society which are not pursuant to its constitutional powers, **[**33]** but which are invasions of the residuary authorities of the smaller societies, will become the supreme law of the land").

119 S. Ct. at 2254 (internal citations omitted). As the Court earlier noted in *Printz*, a reliance on the Supremacy Clause as the source of federal authority "merely brings us back to the question" of whether Congress has the enumerated authority in

the first instance to enact that which is asserted to be supreme. *Printz, 521 U.S. at 924-25.* Put another way, federal law cannot be supreme in an area in which Congress lacks an enumerated power to legislate. *See also Gregory, 501 U.S. at 460* ("*As long as it is acting within the powers granted to it by the Constitution*, Congress may impose its will on the States [under the Supremacy Clause].") (emphasis added).

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n10 The Clause itself states:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary, notwithstanding.
U.S. Const., Art. VI.

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[34]**

As discussed in Part III, *supra*, the enumerated power under which Congress acted when it created the Medicaid statute is the Spending Power. Congress has no power to compel the States to participate in voluntary federal programs like Medicaid. If a State chooses to participate in the program, it certainly must comply with program requirements in order to continue to receive the allotted federal funds, "but the authority to require compliance with participation standards is derived not from the primacy of federal law enacted pursuant to an enumerated power but from the terms of a contract and the agreement to abide by those terms in return for the receipt of federal moneys." *Brogdon v. National Healthcare Corp., 103 F. Supp. 2d 1322, 1339 (N.D.Ga. 2000)* (citing *Pennhurst I, 451 U.S. at 17).* **[*562]** The Supremacy Clause does not operate upon a State or its officers when Congress enacts a program such as Medicaid pursuant to the Spending Power

because neither the Spending Power nor any other Article I power grants Congress the authority to compel State action. The relationship between the Federal and State governments in Spending Power programs is merely **[**35]** one of mutual acquiescence. That Congress may (either directly or through delegation to the HHS Secretary) pass Medicaid laws that are inconsistent with state laws pertaining to the same subject does not render those state statutes void; the Federal government must rely on its power of the purse to seek State compliance with Federal program objectives. *See, e.g., Brogdon, 103 F. Supp. 2d at 1339* (noting that congressional enactments under the Spending Power do not preempt State law) (citing *United States v. Morrison, 529 U.S. 598, 120 S. Ct. 1740, 1754, 146 L. Ed. 2d 658 (2000)).*

Spending Power enactments do not constitute the "supreme authority of the United States," a point made clear by the Court's holdings in *Alden, Printz, New York, South Dakota*, and *Pennhurst I.* By way of example, if Michigan chose not to participate in the Medicaid program, but instead ran a similar program using its own funds under its own guidelines, Michigan's guidelines would not be preempted by the competing federal Medicaid program, because a State's participation in Medicaid is entirely volitional. The situation is identical here because the Constitution **[**36]** grants the Federal Government no power of compulsion under the Spending Clause; Michigan and the Federal government are on equal constitutional footing, and neither has any power to compel the other. The Court has adopted the view espoused by Chief Justice Burger in *Townsend*, which is that Spending Power enactments are "in no way mandatory upon the States under the Supremacy Clause;" States may either comply with the federal requirements, or forego the benefit of the bargain. *Townsend, 404 U.S. at 292* (Burger, C.J., concurring) (internal citation omitted). For this court to hold otherwise would be to do that which Hamilton warned against in Federalist 33, namely, to invade Michigan's residual authority by enforcing

as the supreme law of the land federal legislation that the Constitution does not make supreme. Because congressional enactments pursuant to the Spending Power that set forth the terms of federal-state cooperative agreements depend on the voluntary agreement of participating States and are not within the ambit of the Supremacy Clause, they are not the supreme law of the land, and suits cannot be brought against state officials under *Ex parte Young* **[**37]** to enforce those requirements.

B. The State is the Real Party in Interest When Its Officers Act Within Their Lawful Authority.

By virtue of the *Young* doctrine, sovereign immunity does not bar all suits against state officers. However, "some suits against state officers are barred by the rule that sovereign immunity is not limited to suits which name the State as a party if the suits are, in fact, against the State." *Alden, 119 S. Ct. at 2267* (citing *In re Ayers, 123 U.S. 443, 505-06, 31 L. Ed. 216, 8 S. Ct. 164 (1887); Idaho, 521 U.S. at 270* (explaining that "the real interests served by the Eleventh Amendment are not to be sacrificed to elementary mechanics of captions and pleadings.")). Construing *Young* as permitting suit against state officials for all alleged State violations of federal law would render the doctrine of sovereign immunity meaningless. *See Idaho, 521 U.S. at 269.* As the *Idaho* Court observed:

When suit is commenced against state officials, even if they are named and served as individuals, the State itself will have a continuing interest in the litigation whenever state **[**38]** policies or procedures are at stake. This commonsense **[*563]** observation of the State's real interest when its officers are named as individuals has not escaped notice or comment from the Court, either before or after *Young. See, e.g., Osborn v. Bank of United States, 22 U.S. 738, 9 Wheat. 738, 846-47, 6 L. Ed. 204 (1824)* (stating that the State's interest in the suit was so "direct" that "perhaps no decree ought to have been

announced in the cause, until the State was before the court") (Marshall, C.J.); *Pennhurst II, 465 U.S. at 114 n.25* (noting that *Young* rests on a fictional distinction between the official and the State)[.] . . . Indeed, the suit in *Young*, which sought to enjoin the state attorney general from enforcing state law, implicated substantial state interests. *209 U.S. at 174* ("The manifest, indeed the avowed and admitted, object of seeking [the requested] relief [is] to tie the hands of the State") (Harlan, J., dissenting). We agree with those observations.

To interpret *Young* to permit a federal-court action to proceed in every case where prospective declaratory and injunctive relief is sought against an **[**39]** officer, named in his individual capacity, would be to undermine the principle, reaffirmed just last Term in *Seminole Tribe*, that Eleventh Amendment immunity represents a real limitation on a federal court's federal question jurisdiction. . . . Application of the *Young* exception must reflect a proper understanding of its role in our federal system and respect for state courts instead of a reflexive reliance on an obvious fiction. *See, e.g. Pennhurst II, supra, at 102-03, 114 n.25* (explaining that the limitation in *Edelman v. Jordan, 415 U.S. 651, 39 L. Ed. 2d 662, 94 S. Ct. 1347 (1974),* of *Young* to prospective injunctive relief represented a refusal to apply the fiction in every conceivable circumstance).

Idaho, 521 U.S. at 269-270.

The instant plaintiffs correctly note that *Ex parte Young* suits have been brought repeatedly over at least the past thirty years against state officers for alleged non-compliance with federal-state programs enacted pursuant to the Spending Power. Indeed, the Court's opinion in *Young* permitting some kinds of suits against state officials relied extensively upon its prior opinion **[**40]** in *In re Ayers*, which extensively discussed the circumstances under which state officers could or

could not be sued. *See, generally, Young, 209 U.S. 123* (citing *Ayers, 123 U.S. 443, 8 S. Ct. 164, 31 L. Ed. 216).*

Rather than merely paraphrasing the Court's analysis in *Ayers* to discuss the suitability of such suits, the court believes it more beneficial to quote directly, though at some length, the *Ayers* decision. First:

It must be regarded as the settled doctrine of this court, established by its recent decisions, "that the question whether a suit is within the prohibition of the Eleventh Amendment is not always determined by reference to the nominal parties on the record." *Poindexter v. Greenhow, 114 U.S. 270, 287, 29 L. Ed. 185, 5 S. Ct. 903 (1885).*

Ayers, 123 U.S. at 487. Noting at the outset that this assertion appeared to be in disharmony with Chief Justice Marshall's opinion in *Osborn v. Bank, 22 U.S. 738, 9 Wheat. 738, 857, 6 L. Ed. 204 (1824),* in which the Chief Justice wrote that the party named in the pleadings was controlling for purposes of sovereign immunity **[**41]** analysis, the Ayers Court quoted Marshall's opinion further, which stated that:

"The state not being a party on the record, and the court having jurisdiction over those who are parties on the record, the true question is not one of jurisdiction, but whether, in the exercise of its jurisdiction, the court ought to make a decree against the defendants, - whether they are to be considered as having a real interest, or as being only nominal parties."

[*564] *Ayers, 123 U.S. at 488* (quoting *Osborn, 9 Wheat. at 858).* In light of Chief Justice Marshall's caveat, the *Ayers* Court held *Osborn* to mean that:

where the defendants, who are sued as officers of the state, have not a real, but merely a nominal, interest in the controversy, the state appearing to be the real defendant, and

therefore an indispensable party, if the jurisdiction does not fail for want of power over the parties, it does fail as to the nominal defendants, for want of a suitable subject-matter.

Ayers, 123 U.S. at 488. Writing for the Court in *Governor of Georgia v. Madrazo, 1 Pet. 110 (1828),* a post-*Osborn* case, Chief Justice **[**42]** Marshall appeared to adopt the interpretation *Ayers* was to later make of his Osborn opinion. Relying on *Osborn*, the *Madrazo* Court held that:

"where the chief magistrate of a state is sued, not by his name, but by his style of office, and the claim made upon him is entirely in his official character, we think the state itself may be considered a party on the record. If the state is not a party, there is no party against whom a decree can be brought. No person in his natural capacity is brought before the court as defendant."

Ayers, 123 U.S. at 489 (quoting *Madrazo, 1 Pet. at 123-24).* The *Ayers* Court continued its analysis:

It was therefore held, [in *Madrazo*], that the state was in fact, though not in form, a party defendant to the suit, and that, consequently, the circuit court had no jurisdiction to pronounce the decree appealed from[.] . . . Accordingly, in *Cunningham v. Railway Co., 109 U.S. 446, 27 L. Ed. 992, 3 S. Ct. 292 (1883),* it was decided that in those cases where it is clearly seen upon the record that the state is an indispensable party to enable the court, according to the **[**43]** rules which govern its procedure, to grant the relief sought, it will refuse to take jurisdiction. The inference is that where it is manifest, upon the face of the record, that the defendants have no individual interest in the controversy, and that the relief sought against them is only in their official capacity as representatives of the state, which alone is to be affected by the judgment or decree, the question then arising, whether the suit is not substantially a suit against the state, is one of jurisdiction.

Ayers, 123 U.S. at 489. The *Ayers* Court went on to analyze the import of its post-*Madrazo* decision in *Hagood v. Southern, 117 U.S. 52, 29 L. Ed. 805, 6 S. Ct. 608 (1886):*

[In *Hagood*,] the state of South Carolina, which was the party in interest, was not nominally a defendant. The nominal defendants were the treasurer of the state of South Carolina, its comptroller general, and the treasurers of its various counties and their successors in office. The object of the bills was to obtain on behalf of the complainants, by judicial process, the redemption by the state of certain scrip of which they were holders, according **[**44]** to the terms of a statute in pursuance of which it was issued, by the levy, collection, and appropriation of a special tax pledged to that purpose, as they claimed, by an irrepealable law constituting a contract protected from violation by the Constitution of the United States. The decrees of the circuit court granting the relief were reversed, and the case remanded, with instructions to dismiss the bills, on the ground that the suits, though nominally against the officers of the state, were really against the state itself. In its opinion this court said, "These suits are accurately described as bills for the specific performance of a contract between the complainants and the state of South Carolina, who are the only parties to it. But to these bills the state is not in name made a party defendant, though leave is given to it to become such if it chooses; and except with that consent it could not be brought before the court, and be made to appear and defend. **[*565]** And yet it is the actual party to the alleged contract, the performance of which is decreed, the one required to perform the decree, and the only party by whom it can be performed. Though not nominally a party to the record, it **[**45]** is the real and only party in interest, the nominal defendants being the officers and agents of the state, having no personal interest in the subject matter of the suit, and defending only as representing the state. And the things required by the decrees to be done and performed by them are the very things which,

when done and performed, constitute a performance of the alleged contract by the state. The state is not only the real party to the controversy, but the real party against which relief is sought by the suit, and the suit is therefore substantially within the prohibition of the Eleventh Amendment to the Constitution of the United States." *Hagood, 117 U.S. at 67.*

The conclusions in the case of *Hagood v. Southern* were justified by what had previously been decided by this court in the cases of *Louisiana v. Jumel and Elliot v. Wiltz, 107 U.S. 711, 27 L. Ed. 448, 2 S. Ct. 128 (1882)*[(which were decided in one opinion)]. Those cases had for their object, one, by injunction, to restrain the officers of the state from executing the provisions of the act of the general assembly alleged to be in violation of the contract rights of the **[**46]** plaintiffs, and the other, by mandamus, to require the appropriation of money from the treasury of the state in accordance with the contract. This relief, it was decided, was not within the competency of the judicial power. The Chief Justice said, on that point, "The remedy sought, in order to be complete, would require the court to assume all of the executive authority of the state, so far as it was related to the enforcement of this law, and to supervise the conduct of all persons charged with any official duty in respect to the levy, collection, and disbursement of the tax in question until the bonds, principal and interest, were paid in full; and that, too, in a proceeding in which the state, as a state, was not and could not be made a party. It needs no argument to show that the political power cannot be thus ousted of its jurisdiction, and the judiciary set in its place. When a state submits itself, without reservation, to the jurisdiction of the court in a particular case, that jurisdiction may be used to give full effect to what the state has, by its act of submission, allowed to be done; and if the law permits the coercion of the public officers to enforce any judgment that **[**47]** may be rendered, then such coercion may be employed for that purpose. But this is very far from authorizing the court, when a state cannot be sued, to set up its jurisdiction over the

officers in charge of the public moneys, so as to control them as against the political power, in their administration of the finances of the state." *Louisiana, 107 U.S. at 727.*

Ayers, 123 U.S. at 490-92. In short, the *Ayers* Court held that plaintiffs could not circumvent a State's sovereign immunity from suit by naming as defendants the officers charged with carrying out the State's alleged delinquent responsibilities. Elaborating further, and using the analysis later relied upon in *Ex Parte Young*, the Court delineated the circumstances under which state officers might be sued:

[The *Ayers* plaintiffs who are suing Virginia officers for the state's alleged contractual breach do not] allege any grounds of equitable relief against the individual defendants for any personal wrong committed or threatened by them. It does not charge against them in their individual character anything done or threatened which constitutes, in contemplation of law, **[**48]** a violation of personal or property rights, or a breach of contract to which they are parties. The relief sought is against the defendants, not in their individual but in their representative **[*566]** capacity, as officers of the state of Virginia. The acts sought to be restrained are the bringing of suits by the state of Virginia in its own name, and for its own use. If the state had been made a defendant to this bill by name, charged according to the allegations it now contains, - supposing that such a suit could be maintained, - it would have been subjected to the jurisdiction of the court by process served upon its governor and attorney general, according to the precedents in such cases. If a decree could have been rendered enjoining the state from bringing suits against its taxpayers, it would have operated upon the state only through the officers who by law were required to represent it in bringing such suits, viz., the present defendants, its attorney general, and the commonwealth's attorneys for the several counties. For a breach of such an injunction, these officers would be amenable to the court as proceeding in contempt of its authority, and

would be liable to punishment therefor [**49] by attachment and imprisonment.

The nature of the case, as supposed, is identical with that of the case as actually presented in the bill with the single exception that the state is not named as a defendant. How else can the state be forbidden by judicial process to bring actions in its name, except by constraining the conduct of its officers, its attorneys, and its agents? And if all such officers, attorneys, and agents are personally subjected to the process of the court, so as to forbid their acting in its behalf, how can it be said that the state itself is not subjected to the jurisdiction of the court as an actual and real defendant?

It is, however, insisted upon in argument that it is within the jurisdiction of the circuit court of the United States to restrain by injunction officers of the states from executing the provisions of state statutes void by reason of repugnancy to the Constitution of the United States; that there are many precedents in which that jurisdiction has been exercised under the sanction of this court; and that the present case is covered by their authority.

Ayers, 123 U.S. at 497-98 (internal citations omitted). But the [**50] precedents referred to, in which the Court permitted state officers to be sued were:

adjudged not to be a suit against the state, and not to be one in which the state was a necessary party, [and the rationale permitting suit] was that the defendants personally and individually were wrong-doers, against whom the complainants had a clear right of action for the recovery of the property taken, or its value, and that, therefore, it was a case in which no other parties were necessary. The right asserted and the relief asked were against the defendants as individuals. They sought to protect themselves against personal liability by their official character as representatives of the state. This they

were not permitted to do, because the authority under which they professed to act was void.

. . .

The vital principle in all such cases is that the defendants, though professing to act as officers of the state, are threatening a violation of the personal or property rights of the complainant, for which they are personally and individually liable[.] . . . "A defendant sued as a wrong-doer, who seeks to substitute the state in his place, or to justify by the authority of the state, **[**51]** or to defend on the ground that the state has adopted his act and exonerated him, cannot rest on the bare assertion of his defense. He is bound to establish it. The state is a political corporate body, can only act through its agents, and can command only by laws. It is necessary, therefore, for such a defendant, in order to complete his defense, to produce a law of the state which constitutes his commission as its agent and a warrant for his act[.]" . . . **[*567]** The legislation under which the defendant justified, being declared to be null and void, as contrary to the Constitution of the United States, therefore left him defenseless, subject to answer to the consequences of his personal act . . [.]

Ayers, 123 U.S. at 500-01 (quoting *Poindexter v. Greenbow, 114 U.S. at 288.* A state officer can claim to be acting as the agent of the State only where such authority has been conferred by law. *See Ayers, 123 U.S. at 501* (citing *United States v. Lee, 106 U.S. 196, 27 L. Ed. 171, 1 S. Ct. 240 (1882)).* The *Ayers* Court went on to explain that the question of whether a state officer possesses lawful authority is a **[**52]** feature that:

will be found, on an examination, to characterize every case where persons have been made defendants for acts done or threatened by them as officers of the government, either of a state or of the United States, where the objection has been interposed that the state was the real defendant, and has been overruled. The action has been sustained only in those

instances where the act complained of, considered apart from the official authority alleged as its justification, and as the personal act of the individual defendant, constituted a violation of right for which the plaintiff was entitled to a remedy at law or in equity against the wrong-doer in his individual character.

Ayers, 123 U.S. at 501-02. Utilizing the analysis to later be relied upon in *Young*, the Court explicated the circumstances under which Eleventh Amendment sovereign immunity poses no bar to suits against state officers acting under color of authority for violations of federal rights:

The government of the United States, in the enforcement of its laws, deals with all persons within its territorial jurisdiction as individuals owing obedience to its authority. The **[**53]** penalties of disobedience may be visited upon them without regard to the character in which they assume to act, or the nature of the exemption they may plead in justification. Nothing can be interposed between the individual and the obligation he owes to the Constitution and laws of the United States, which can shield or defend him from their just authority, and the extent and limits of that authority the government of the United States, by means of its judicial power, interprets and applies for itself. If therefore, an individual, acting under the assumed authority of a state, as one of its officers, and under color of its laws, comes into conflict with the superior authority of a valid law of the United States, he is stripped of his representative character, and subjected in his person to the consequences of his individual conduct. The state has no power to impart to him any immunity from responsibility to the supreme authority of the United States.

Ayers, 123 U.S. at 507.

Reiterating its analyses under the facts presented by *Ayers, see id. at 502-04,* the Court came to the identical conclusion found in the precedents it relied upon:

Where [**54] the contract is between the individual and the state, no action will lie against the state, and any action founded upon it against defendants who are officers of the state, the object of which is to enforce its specific performance by compelling those things to be done by the defendants which, when done, would constitute a performance by the state, or forbid the doing of those things which, if done, would merely be breaches of the contract of the state, is in substance a suit against the state itself, and equally within the prohibition of the Constitution.

It cannot be doubted that the Eleventh Amendment to the Constitution operates to create an important distinction between contracts of a state with individuals and contracts between individual [*568] parties[.] . . . By virtue of the Eleventh Amendment to the Constitution, there being no remedy by a suit against the state, the contract is substantially without sanction, except that which arises out of the honor and good faith of the state itself, and these are not subject to coercion. Although the state may, at the inception of the contract, have consented as one of its conditions to subject itself to suit, it may subsequently withdraw [**55] that consent, and resume its original immunity, without any violation of the obligation of its contract in the constitutional sense. The very object and purpose of the Eleventh Amendment were to prevent the indignity of subjecting a state to the coercive process of judicial tribunals at the instance of private parties. It was thought to be neither becoming nor convenient that the several states of the Union, invested with that large residuum of sovereignty which had not been delegated to the United States, should be summoned as defendants to answer to complaints of private persons . . . or that the course of their public policy and the administration of their public affairs should be subject to and controlled by the mandates of judicial tribunals, without their consent, and in

favor of individual interests. To secure the manifest purposes of the constitutional exemption guaranteed by the Eleventh Amendment, requires that it should be interpreted, not literally and too narrowly, but fairly, and with such breadth and largeness as effectually to accomplish the substance of its purpose. In this spirit it must be held to cover, not only suits brought against a state by name, but those also **[**56]** brought against its officers, agents, and representatives, where the state, though not named as such, is, nevertheless, the only real party against which alone in fact the relief is asked, and against which the judgment or decree effectively operates.

Ayers, 123 U.S. 443, 504-06, 31 L. Ed. 216, 8 S. Ct. 164 (internal citations omitted).

It bears repeating that the *Ayers* decision is the basis of the Court's holding in *Ex parte Young*, and that *Ayers* has been recently reaffirmed in *Idaho* and *Alden*. The applicability of state sovereign immunity to state officers, and the corresponding narrowness of the *Young* exception were also more recently discussed at length in the Court's *Pennhurst II* decision. *See 465 U.S. 89, 104 S. Ct. 900, 79 L. Ed. 2d 67 (1984).* In that case, a class action complaint was brought in federal court seeking injunctive relief against state officers responsible for operating an institution for mentally retarded patients, allegedly in a manner violative of federal and state law. *Id.* Returning to the familiar principals enunciated in *Ayers*, the Court stated that, "It is clear, of course, that in the absence of consent a suit in **[**57]** which the State or one of its agencies or departments is named as the defendant is proscribed by the Eleventh Amendment," and that "this jurisdictional bar applies regardless of the nature of the relief requested." *Id., at 100* (internal citations omitted).

And, as it had in *Ayers*, the Court held once again that:

The Eleventh Amendment bars a suit against state officials when "the state is the real, substantial party in interest." *Ford*

Motor Co. v. Department of Treasury, 323 U.S. 459, 464, 89 L. Ed. 389, 65 S. Ct. 347 (1945). See, e.g., In re Ayers, 123 U.S. 443, 487-92, 31 L. Ed. 216, 8 S. Ct. 164 (1887); Louisiana v. Jumel, 107 U.S. 711, 720-723, 27 L. Ed. 448, 2 S. Ct. 128 (1882). Thus, "the general rule is that relief sought nominally against an officer is in fact against the sovereign if the decree would operate against the latter." *Hawaii v. Gordon, 373 U.S. 57, 58, 10 L. Ed. 2d 191, 83 S. Ct. 1052 (1963)* (*per curiam*). And, as when the State itself is named as the defendant, a suit against state officials that is in fact a suit against a State is barred regardless of whether **[**58]** it seeks **[*569]** damages or injunctive relief. *See Cory v. White, 457 U.S. 85, 91, 72 L. Ed. 2d 694, 102 S. Ct. 2325 (1982).*

Pennhurst II, 465 U.S. at 101-02.

As noted in Part IV.A., *supra*, the Medicaid statutes at issue in this litigation do not involve supreme federal law. In *Pennhurst II*, by contrast, the Court forbade federal courts from enjoining state officers purportedly acting in contravention of state law. Though the Court observed that it was not reaching the specific question of whether federal courts had jurisdiction to grant prospective relief on the basis of federal law (and without reference as to whether such federal law was "supreme"), it did note that "the scope of any such relief would be constrained by principles of comity and federalism." *Id. at 104 n.13* (citing *Rizzo v. Goode, 423 U.S. 362, 378, 46 L. Ed. 2d 561, 96 S. Ct. 598 (1976)* (quoting *Stefanelli v. Minard, 342 U.S. 117, 120, 96 L. Ed. 138, 72 S. Ct. 118 (1951)*)("Where, as here, the exercise of authority by state officials is attacked, federal courts must be constantly mindful of the 'special delicacy of the adjustment **[**59]** to be preserved between federal equitable power and State administration of its own law.'")). The Court then went on to discuss at length the circumstances in which a suit against a state officer was in reality a suit against the sovereign State, and the limited

circumstances under which suit against such officials might be brought under *Young*:

The general rule is that a suit is against the sovereign if "the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration," or if the effect of the judgment would be "to restrain the Government from acting, or to compel it to act." *Dugan v. Rank, 372 U.S. 609, 620, 10 L. Ed. 2d 15, 83 S. Ct. 999 (1963)* (citations omitted).

Pennhurst II, 465 U.S. at 101 n.11.

The *Pennhurst II* Court noted that in *Belknap v. Schild, 161 U.S. 10, 40 L. Ed. 599, 16 S. Ct. 443 (1896),* it had drawn a careful distinction between actions in tort against a state officer as an individual and "suits in which the relief would run more directly against the State." *Pennhurst II, 465 U.S. at 111 n.21* (citing *Belknap, 161 U.S. at 18).* **[**60]** That distinction was reiterated yet again in *Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 93 L. Ed. 1628, 69 S. Ct. 1457 (1949),* where the Court "plainly and explicitly rejected"

the argument that an allegation that a government official committed a tort sufficed to distinguish the official from the sovereign. Therefore, the argument went, a suit for an injunction to remedy the injury would not be against the sovereign. The Court rejected the argument, noting that it would make the doctrine of sovereign immunity superfluous. A plaintiff would need only to "claim an invasion of his legal rights" in order to override sovereign immunity. *Larson, 337 U.S. at 693.* In the Court's view, the argument "confused the doctrine of sovereign immunity with the requirement that a plaintiff state a cause of action." *Id. at 692-93.*

Pennhurst II, 465 U.S. at 112. Under that rejected theory, "a plaintiff would need only claim a denial of rights protected or

provided by statute in order to override sovereign immunity," thereby rendering it a virtual nullity. *Id. Larson* established that the test of whether **[**61]** sovereign immunity is overridden under *Young* "turns on whether the defendant state official was empowered to do what he did, i.e., whether, even if he acted erroneously, it was action within the scope of his authority." *Id.* at n.22, (citing *Larson, 337 U.S. at 685).* The *Larson* Court explicitly rejected the theory that "an officer given the power to make decisions is only given the power to make correct decisions." *Id.* (citing *Larson, 337 U.S. at 695).* **[*570]** "The Court in Larson made crystal clear that an officer might make errors and still be acting within the scope of his authority." *Id.* As summarized by the *Pennhurst II* Court:

Larson thus made clear that, at least insofar as injunctive relief is sought, an error of law by state officers acting in their official capacities will not suffice to override the sovereign immunity of the State where the relief effectively is against it. *Larson, 337 U.S. at 690, 695.* Any resulting disadvantage to the plaintiff was "outweighed by "the necessity of permitting the Government to carry out its functions unhampered by direct judicial intervention." *Id. at 704.* **[**62]** If anything, this public need is even greater when questions of federalism are involved.

Pennhurst II, 465 U.S. at 113-114.

The instant plaintiffs posit that their complaint poses no question of a waiver or abrogation of Michigan's sovereign immunity because they seek only prospective injunctive relief against Messrs. Haveman and Smedes, not the State itself. Having sued only these individuals, plaintiffs argue, *Ex parte Young* negates any sovereign immunity issue that would undoubtedly be implicated if they had sued Michigan directly. But plaintiffs' description of the *Young* doctrine drastically oversimplifies what it permits and conflicts with Supreme Court precedents, both ancient and modern.

According to the doctrine recently reaffirmed by the Supreme Court in *Idaho*, to accept plaintiff's position here that *Young* permits all suits against state officers as proxies of their employing State would render sovereign immunity meaningless. *Young* permits a federal suit against a state officer only where the state law under which he purports to be acting is in conflict with federal law, under the legal fiction that he is thereby "stripped of **[**63]** his representative character." Because the officer cannot exercise void legal authority on the State's behalf, he is acting solely in his capacity as an individual, and can be held personally liable for his wrongdoing.

Here, the opposite is true. Messrs. Haveman and Smedes are not named as defendants because they have acted beyond their lawful authority as state officers, or because the Michigan statutes granting them authority are void in the face of superceding federal law. Plaintiffs do not claim these two individuals acted without lawful authority; in fact, plaintiffs have sued them precisely because they do have the alleged lawful authority to accomplish the relief plaintiffs seek. There is no personal, unlawful behavior attributed to these two men that plaintiffs wish to enjoin. They are sued solely in their capacities as representatives of the State of Michigan. It is Michigan, not Haveman and Smedes who are parties to the Medicaid agreement with the federal government. It is Michigan's treasury, not the officers' pocketbooks, which will pay for the EPSDT programs plaintiffs seek. It is Michigan that would bear the burden of administering this program under any order issued **[**64]** by this court, regardless of whether Haveman and Smedes are the individuals charged with implementing the State's obligations. Michigan is the only real party against whom plaintiffs seek relief in this suit; the naming of the officers as defendants is an empty formality. In substance, plaintiffs assert that the State has not met its purported responsibilities, and that this court should commandeer the executive authority of the State, take charge

of its officers, and appropriate from its treasury in order to provide the level of Medicaid services argued for by plaintiffs. Supreme Court jurisprudence from Chief Justice Marshall's time to the present makes it plain that federal courts lack such authority.

In arguing to the contrary, plaintiffs rely on the "holding" in *Quern v. Jordan, 440 U.S. 332, 59 L. Ed. 2d 358, 99 S. Ct. 1139 (1979)* for the proposition that "a federal **[*571]** court, consistent with the Eleventh Amendment, may enjoin state officials to conform their future conduct to the requirements of federal law, even though such an injunction may have an ancillary effect on the state treasury." *Id. at 337.* But this "holding" attributed to *Quern* **[**65]** is not the case holding at all, but is instead a summary of a discussion from the previous iteration of the same case, *Edelman v. Jordan, 415 U.S. 651, 667-68, 39 L. Ed. 2d 662, 94 S. Ct. 1347 (1974).* The cited *Edelman* discussion was, in turn, a brief listing of several cases in which *Ex parte Young* had been found to apply, followed by the obvious observation that even prospective injunctive relief against state officers can have an effect on a State's treasury (such as in *Ex parte Young* itself, where the State lost revenue by dint of its officers being precluded from levying penalties in violation of the due process clause). *Id. Edelman* contains no discussion of when state officers will be deemed to act in the shoes of the State for sovereign immunity purposes, except for a cautionary note (directly preceding the passage upon which plaintiffs vicariously cite through *Quern*) that *Ex parte Young* and its progeny do not permit all forms of prospective injunctive relief against state officers, and that Young's reliance upon *Hagood* and *Ayers* for the proposition that the federal courts cannot compel state officers to enforce State contracts **[**66]** was still good law. *Edelman, 415 U.S. at 666-67* (citing *Hagood, 117 U.S. 52, 6 S. Ct. 608, 29 L. Ed. 805* and *Ayers, 123 U.S. 443, 31 L. Ed. 216, 8 S. Ct. 164).* Indeed, the Supreme Court has explicitly disclaimed having decided a jurisdictional issue in *Edelman. See Hagans v.*

Lavine, 415 U.S. 528, 533 n.5, 39 L. Ed. 2d 577, 94 S. Ct. 1372 (1974). Hence, even *Edelman* serves as a reminder that *Ex parte Young* is not a carte blanche authorization for prospective equitable relief against individual state officers.

Quern instead stands for the relatively innocuous proposition that a federal court has the authority to order a defendant State to provide opposing litigants with notice of the "prospective relief already ordered by the court," *440 U.S. at 349,* and that such notice is purely "ancillary," *id.*, because "the mere sending of that notice does not trigger the state administrative machinery." *Id. at 348.* The Court found it significant that:

Whether a recipient of notice [ordered by a court against a defendant state] decides to take advantage of those available state procedures [to obtain the **[**67]** benefits plaintiffs claimed were unlawfully denied them] is left completely to the discretion of that particular class member; the federal court plays no role in that decision. And whether or not the class member will receive retroactive benefits rests entirely with the State, its agencies, courts, and legislature, not with the federal court.

Id. Notwithstanding plaintiffs' reliance on it here, *Quern* is a decision describing the limits of a federal court's power to authorize relief against a State, and approving of it in that case precisely because it was not substantive relief, and as such would have no effect on the State's sovereign ability to manage its own program.

The foregoing analysis of the limits of the holdings in *Quern* and Edelman's was confirmed in *Pennhurst II*, when the majority opinion addressed the dissent's theory of the prospective equitable relief available against state officers, which is identical to that proposed by plaintiffs here:

In *Edelman*, although the State officers were alleged to be acting contrary to law, and therefore should have been "stripped of their authority" under the theory of the dissent, we held the action [**68] to be barred by the Eleventh Amendment. The dissent attempts to distinguish *Edelman* on the ground that the retroactive relief there, unlike injunctive relief, does not run against the agent. To say that injunctive relief against [*572] State officials acting in their official capacity does not run against the State is to resort to the fictions that characterize the dissent's theories. Unlike the English sovereign perhaps, an American State can act only through its officials. It is true that the Court in *Edelman* recognized that retroactive relief often, or at least sometimes, has a greater impact on the State treasury than does injunctive relief, but there was no suggestion that damages alone were thought to run against the State while injunctive relief did not. We have noted that the authority-stripping theory of *Young* is a fiction that has been narrowly construed. . . . The [*ultra vires*] doctrine excepts from the Eleventh Amendment bar suits against officers acting in their official capacities but without any statutory authority, even though the relief would operate against the State. At bottom, the doctrine is based on the fiction of the *Young* opinion. The dissent's [**69] method is merely to take this fiction extreme. While the dissent's result may be logical, in the sense that it would be difficult to draw principled lines short of that end, its view would virtually eliminate the constitutional doctrine of sovereign immunity. . . . For present purposes, however, we do no more than question the continued vitality of the *ultra vires* doctrine in the Eleventh Amendment context. We hold only that to the extent the doctrine is consistent with the analysis of this opinion, it is a very narrow exception that will allow suit only under the standards set forth in n.11, *supra.*

Pennhurst II, 465 U.S. at 114 n.25 (internal citations omitted); *See also Green v. Mansour, 474 U.S. 64, 70-71, 88 L. Ed. 2d 371, 106 S. Ct. 423 (1985)* (confirming that notice in *Quern*

was not an independent form of relief, and was merely a "case-management device").

In note 11, as previously set forth in this opinion, *supra*, the *Pennhurst II* Court held that:

The general rule is that a suit is against the sovereign if the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration, **[**70]** or if the effect of the judgment would be to restrain the Government from acting or compel it to act. . . [A] state officer may be said to act *ultra vires* only when he acts without any authority whatever. . . An *ultra vires* claim rests on the officer's lack of delegated power. A claim of error in the exercise of that power is therefore not sufficient.

465 U.S. at 102 n.11 (internal citations and quotations omitted).

The Court then further noted that the defendant state officers in *Pennhurst II*, who were responsible for operating the mental health institutions whose care was alleged to be inadequate, plainly were not acting beyond the authority delegated by the State to operate the institution. *Id.* In other words, they were acting lawfully as agents of the State, even though their exercise of the State's authority was purportedly substandard. Put simply, they were acting *intra vires*. That an agent may be doing a poor job of exercising his agency does not make him less of an agent. It is only when he acts beyond the authority delegated to him that he acts *ultra vires. C.f. Wisconsin Bell v. Public Service Comm'n of Wisconsin, 57 F. Supp. 2d 710, 713 (W.D.Wis. 1999)* **[**71]** (explaining that "one must acknowledge the conceptual difference between a state official performing state functions in a way that violates federal law and a state official who is performing federally authorized functions but is alleged to be performing those functions improperly"); *accord Children's Healthcare is a Legal Duty, Inc. v. Deters, 92 F.3d 1412, 1416-18 (6th Cir.*

1996) (describing *Young* as a limited exception to Eleventh Amendment immunity that is inapplicable where no unconstitutional actions by state officers are alleged).

It is on this point - that it is really the State that is being sued - that plaintiffs **[*573]** present one of their strongest arguments, in which they describe Michigan's assertion of sovereign immunity to suit as a "red herring" because the Sixth Circuit and this court have held on numerous occasions that the Eleventh Amendment does not bar suits for prospective injunctive relief against state officers, even when those officers are being sued in their official capacity and the relief will actually run against the State. *See Nelson v. Miller, 170 F.3d 641, 645 (6th Cir. 1999); Futernick v. Sumpter Township, 78 F.3d 1051, 1055* **[**72]** (6th Cir.), *cert. denied sub. nom., Futernick v. Caterino, 519 U.S. 928, 136 L. Ed. 2d 215, 117 S. Ct. 296 (1996); Doe v. Wigginton, 21 F.3d 733, 736-37 (6th Cir. 1994); Akella v. Mich. Dept. of State Police, 67 F. Supp. 2d 716, 722 (E.D.Mich. 1999).* In each case, the test utilized for determining whether a suit against a state officer in his official capacity was in fact a suit against the State was whether the relief sought was retrospective or prospective. That criterion is undoubtedly correct. *Ex parte Young* at most offers plaintiffs only prospective relief, and retrospective relief cannot be granted because it will inevitably be at the State's expense. But that is not the only criterion. As the Sixth Circuit observed in *Children's Healthcare*, the availability of the *Young* doctrine depends upon there being an officer who is acting outside his lawful authority, or on the basis of authority assumed in contravention of the federal Constitution. *See Children's Healthcare, 92 F.3d at 1414-16.* Furthermore, in *Alden v. Maine*, a Supreme Court opinion written subsequent to the cases upon which plaintiffs **[**73]** rely, the Court reiterated the *ultra vires-intra vires* distinction under *Ex parte Young*, as well as noting yet again that the *Young* doctrine did not authorize all suits for prospective equitable relief:

The exception to our sovereign immunity doctrine recognized in *Ex parte Young* is based in part on the premise that sovereign immunity bars relief against States and their officers in both state and federal courts, and that *certain suits* for declaratory or injunctive relief against state officers must therefore be permitted if the Constitution is to remain the supreme law of the land. As we explained in *General Oil Co. v. Crain, 209 U.S. 211, 52 L. Ed. 754, 28 S. Ct. 475 (1908),* a case decided the same day as *Ex parte Young* and extending the rule of that case to state-court suits: "It seems to be an obvious consequence that as a State can only perform its functions through its officers, a restraint upon them is a restraint upon its sovereignty from which it is exempt without its consent in the state tribunals, and exempt by the Eleventh Amendment of the Constitution of the United States, in the national tribunals. The error is in the universality **[**74]** of the conclusion, as we have seen. Necessarily to give adequate protection to constitutional rights *a distinction must be made between valid and invalid state laws*, as determining the character of the suit against state officers."

Alden, 119 S. Ct. at 2263 (quoting *General Oil, 209 U.S. at 226-27)* (emphasis added) (internal citations omitted). Plaintiffs sole reliance upon a prospective-retrospective test for *Ex parte Young* relief fails not because it is unnecessary, but because it is insufficient.

Messrs. Haveman and Smedes are indisputably the individuals responsible for carrying out the EPSDT services on behalf of Michigan of which plaintiffs complain. However, they are acting in their official capacities within the authority delegated to them by the State, and the relief sought against them is in reality to be inflicted only against the State. Accordingly, the State of Michigan is the real defendant in this suit, and the doctrine of *Ex parte Young* does not apply, even though plaintiffs have nominally named individual state officers as defendants. Unless otherwise waived by the State,

Michigan's officers share the State's immunity [**75] from private suits so long as they are acting within the lawful authority delegated to them by the [*574] State, and this court has no authority to order the relief sought against them.

C. The Court Lacks Authority to Compel State Officers Performing Discretionary Functions

Under the doctrine of *Ex parte Young*:

> There is no doubt that the [federal] court cannot control the exercise of the discretion of an officer. It can only direct affirmative action where the officer having some duty to perform not involving discretion, but merely ministerial in nature, refuses or neglects to take such action. In that case, the court can direct the defendant to perform this merely ministerial duty.

Ex parte Young, 209 U.S. at 158 (internal citation omitted). Plaintiffs here quote a similar holding from *In re Ayers*, which stated:

> It has been well settled that, when a plain official duty, requiring no exercise of discretion, is to be performed, and performance is refused, any person who will sustain personal injury by such refusal may have a mandamus to compel its performance; . . [.]

In re Ayers, 123 U.S. at 506 (internal [**76] citation omitted).

This court's review of the statutes and regulations upon which plaintiffs' complaint relies as the basis for Messrs. Haveman's and Smedes' purported wrongdoing informs it that their responsibilities "involve the paradigmatic exercise of discretion." *Wisconsin Bell, 57 F. Supp. 2d at 713.* That is, even if Michigan were obligated to provide all of the services plaintiffs argue are required (an argument that the State disputes in many facets) the federal laws upon which plaintiffs

rely do not explain how those levels of service are to be reached, nor do those federal laws require that the State provide service in a particular manner. Moreover, even if the responsible state officials are obligated to accomplish the purportedly federally-mandated goals, plaintiffs point this court to no statutes or regulations that deny those decision makers "the character of judgment or discretion" in determining how to get there. *United States ex. rel. Girard Trust Co. v. Helvering, 301 U.S. 540, 543-44, 81 L. Ed. 1272, 57 S. Ct. 855 (1937).* Under the laws relied upon by plaintiffs, the lack of official discretion necessary to invoke *Ex parte Young* [**77] mandamus-type relief is, at a minimum, far from being "clear." *See, e.g., Heckler v. Ringer, 466 U.S. 602, 616, 80 L. Ed. 2d 622, 104 S. Ct. 2013 (1985)* (explaining that defendant must owe plaintiff a "clear, nondiscretionary duty" under common law of mandamus). Even though they fail to allege such an obvious nondiscretionary duty, plaintiffs seek the appointment of a Special Master whereby the court can superintend the performance of the Michigan Department of Community Health's management of the EPSDT program. The claimed need for such superintending demonstrates that plaintiffs in actuality seek to have the court to exercise its discretion in place of the State's; were this not the case, it would seem that a simple injunctive order would be sufficient to require the defendants to perform their "nondiscretionary" duties. Nonetheless, plaintiffs' complaint utterly fails to allege that named defendants Haveman and Smedes lack discretion in managing the EPSDT services at issue in this litigation, and that failure precludes this suit from falling within the narrow class of cases eligible for *Ex parte Young* relief.

D. Where the Statutory Scheme Provides a Remedy, [78] the Court May Not Substitute an Alternative Form of Relief.**

In *Seminole Tribe*, the Supreme Court held that:

Where Congress has prescribed a detailed remedial scheme for the enforcement against a State of a statutorily created right, a court should hesitate before casting aside those limitations and permitting an action against a state officer based upon *Ex parte Young*.

[*575] *Seminole Tribe, 517 U.S. at 74; accord Telespectrum, Inc. v. Public Serv. Comm'n of Kentucky, 227 F.3d 414, 419-21 (6th Cir. 2000)* (recognizing *Seminole* Tribe's limitation of *Ex parte Young* where a statutory remedial scheme already exists).

The *Seminole Tribe* Court recognized that under the statute at issue in that litigation, Congress had already imposed upon states participating in the program at issue a limited form of liability for non-compliance. *517 U.S. at 75-76.* To permit the full panoply of remedial sanctions available under *Ex parte Young* to be imposed against such States, the Court recognized, would render the more limited sanctions contained in the statute superfluous. *Id.; see also Wisconsin Bell, 57 F. Supp. 2d at 713* **[**79]** (indicating that a statutory provision for judicial review of state commission actions was exclusive remedy, rendering *Ex parte Young* irrelevant). As previously discussed in Part II, *supra*, the Medicaid statute contains a specific, limited remedy that may be used against non-compliant States: The HHS Secretary may withhold funds from those States that she believes are not meeting their contractual responsibilities under the federal-state cooperative agreement.

In *Suter v. Artist M., 503 U.S. 347, 118 L. Ed. 2d 1, 112 S. Ct. 1360 (1992),* the Court suggested (without so finding) that the provision of a funding cutoff mechanism within a statutory program enacted under the Spending Power might foreclose remedies by private plaintiffs. *Id. at 360-61, n.11-12.* The *Suter* Court observed that so long as the federal government maintained the ability to enforce the program requirements at issue with the carrot and stick of federal funds, those requirements could hardly be considered unenforceable. *Id. at 360-61. Suter*, however, was decided before *Seminole Tribe*,

and in the later case the Court's suggestion in *Suter* came **[**80]** to fruition. Because the Medicaid statute contains a remedial enforcement provision far more limited than that which this court might order under *Ex parte Young* (and certainly more limited that the relief sought be plaintiffs), this court is without authority to defy the congressionally-mandated scheme and impose more extensive remedial measures, even if they might be more efficacious n11 in accomplishing the congressional purpose. The existence of a limited remedy in the Medicaid statute precludes the use of *Ex parte Young* to enforce the statutory scheme by other means.

----------Footnotes----------

n11 A supposition not intended to be implied here.

----------End Footnotes----------

V. Whether § 1983 Creates a Private Cause of Action Against Michigan's Officers for Non-Compliance With the Medicaid Program

In addition to arguing that defendants are liable under the *Ex parte Young* doctrine (an argument the court has found unpersuasive) n12 plaintiffs also argue that Michigan has voluntarily waived its sovereign immunity from suit, *see, e.g., College Savings, 119 S. Ct. at 2223,* **[**81]** and that Michigan knowingly accepted the unambiguous condition, *see Pennhurst I, 451 U.S. at 17,* that it be amenable to private causes of action for non-compliance with the terms of the Medicaid program. As previously explained, it is undisputed that the Medicaid statute itself contains no such condition. But plaintiffs maintain that *42 U.S.C. § 1983,* which was enacted well before the EPSDT programs at issue in this litigation, creates a generalized private right of action against States for their non-compliance with federal programs enacted pursuant to the Spending Power. n13 Plaintiffs argue that Michigan knew of this unambiguous condition at the time it **[*576]** agreed to

accept the federal Medicaid funds, and that this condition has been repeatedly reaffirmed in the years since Medicaid's enactment. As will be discussed below, the court finds plaintiffs' position, while not without support, to be unpersuasive.

----------Footnotes----------

n12 *See, supra*, Part IV.

n13 It bears emphasizing that plaintiffs do not argue that every federal-state program enacted pursuant to the Spending Power creates a private cause of action. Whether a private cause of action exists, they posit, depends solely on the construction of the substantive law enacted pursuant to the Spending Clause, which should be construed in conformity with criteria set out by the Supreme Court. If such construction leads to the conclusion that Congress intended a particular statutory provision to specifically benefit a particular private party, it is plaintiffs' position that § 1983 automatically makes state officers amenable to suit for violations of that statute. As previously alluded to in Footnote 8, *supra*, the court assumes for purposes of this litigation, without so deciding, that the EPSDT provisions at issue are intended to benefit the instant plaintiffs. The court's inquiry here concerns plaintiff's threshold assertion - namely, whether § 1983 does, in fact, operate as a blanket authorization for such suits.

----------End Footnotes----------

[82]**

In pertinent part, § 1983 states that:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the

jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983. The parties here concur that under *Will v. Michigan Dept. of State Police, 491 U.S. 58, 105 L. Ed. 2d 45, 109 S. Ct. 2304 (1989),* a State is not a "person" for purposes of § 1983. *Id. at 64.* Plaintiffs maintain, however, that Messrs. Haveman and Smedes are "persons" amenable to suit under § 1983, and that *Will* supports that understanding.

In *Will*, the Court noted that although the scope of the Eleventh Amendment and the scope of § 1983 are separate issues, they are interrelated. *Id. at 66-67.* For purposes of this litigation, however, it is not entirely clear whether **[**83]** plaintiffs' position is that § 1983 independently operates to waive the sovereign immunity held by state officers acting in their official capacity, or whether such waiver is dependent on the applicability of the *Ex parte Young* doctrine (though it is clear that plaintiffs rely extensively on the doctrine in disputing the State's arguments concerning the state of the law *circa* 1871). n14 But the court's analysis here, however, need not determine the extent to which Michigan's Eleventh Amendment immunity cabins the potential § 1983 liability of its officers. Whether or not § 1983 might be limited by *Ex parte Young* is irrelevant for purposes of this suit, because it is clear under controlling Supreme Court precedent that § 1983 does not create a blanket cause of action for Spending Power programs operated pursuant to voluntary federal-state agreements.

----------Footnotes----------

n14 The lack of clarity on this point is perfectly understandable, given that plaintiffs maintain that their suit is properly brought under *Ex parte Young*, though the court has ultimately determined that it is not.

----------End Footnotes----------
[**84]

A. Will's "Clear Statement" and Contemporaneous Construction Requirements for Construing § 1983

In *Will*, the Supreme Court held that:

the language of § 1983 [] falls short of satisfying the ordinary rule of statutory construction that if Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute . . . Congress should make its intention clear and manifest if it intends to pre-empt the historic powers of the States, or if it intends to impose a condition on the grant of federal moneys. In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision.

Id. at 65 (internal citations and quotations omitted). The *Will* Court held that because a State could not be [*577] sued without its consent at the time of § 1983's enactment, the statute had to be construed consistent with the state of the law contemporaneous with its enactment [**85] absent an explicit statutory alteration of that understanding. *Id. at 67.* Specifically, the Court held that:

In enacting § 1983, Congress did not intend to override well-established immunities or defenses under the common law. One important assumption underlying the Court's decisions in this area is that members of the 42nd Congress were familiar with common-law principles, including defenses previously recognized in ordinary tort litigation, and that they likely

intended these common-law principles to obtain, absent specific provisions to the contrary.

Id. (internal citations and quotations omitted); *accord Blessing, 520 U.S. at 350* (Scalia, J., concurring) ("While it is of course true that newly enacted laws are automatically embraced within § 1983, it does not follow that the question of what rights those new laws (or, for that matter, old laws) secure is to be determined according to modern notions rather than according to the understanding of § 1983 when it was enacted"). As explained in Part III, *supra*, the relationship between Michigan and the Federal Government is a contract. Accordingly, in determining whether § **[**86]** 1983 gives third-party beneficiaries of a federal-state contract the right to sue state officers for contractual breach, this court is required under *Will* to examine whether the law permitted such suits at the time of § 1983's enactment in 1871.

B. Under the Common Law of 1871 Sovereign Immunity Did Not Permit States to be Sued for Breach of Contract, and the Law of Agency Prohibited Officer-Agents to be Liable for Contractual Breach by State-Principals.

First, as discussed at length in Part IV.B., *supra*, it was clear both before and after the enactment of § 1983 that a private party contract could not be maintained against the States or their officers for breach of contract. n15 Because of considerations of brevity, and because the issue is not in doubt (plaintiffs having offered no authority to the contrary as to this point), this court will limit its recitation to the Supreme Court cases of the period following § 1983's enactment, which repeatedly held that state officers could not be enjoined to perform a State's contractual obligations because they were not parties to the contracts in their personal capacity.

----------Footnotes----------

n15 The briefs of *amicus curiae* MML extensively set forth the state of the law concerning the States' immunity from suit for breaches of their own contracts and the attendant lack of state officer amenability to suit under then-prevailing agency law.

----------End Footnotes----------

[87]**

To begin, in *Louisiana v. Jumel, 107 U.S. 711, 27 L. Ed. 448, 2 S. Ct. 128 (1883),* the Court held that the officers and agents of the State could not be ordered to enforce the State's obligations to its bondholders. *Id. at 721-723* ("They [the state's officers] may be moved through the State, but not the State through them."); *Id. at 723-24* ("here, the obligation is all on the State, to be discharged through its servants, and the money is held by the officers proceeded against in their character as servants of the State, and no other"). Similarly, in *Hagood v. Southern, 117 U.S. 52, 29 L. Ed. 805, 6 S. Ct. 608 (1886),* the Court dismissed a suit in which the plaintiffs sought specific performance of a contract between the plaintiffs and the State, even though the named defendants were officers of the State, because the officers had no real interest in the suit, as the State was the only real party in interest. *Id. at 67.* And, as discussed earlier in Part IV.B., *supra*, the Court in *Ayers* dismissed a suit to enjoin state officers from taking action that would allegedly breach the State's contract. **[**88]** *Ayers, 123 U.S. at 497, 503.*

In short, there is no doubt that, at the time of § 1983's enactment, agency law did **[*578]** not permit state officers to be sued for the contractual breaches of their employing states. Nor is there any doubt that a suit for a State's contractual breach was barred by sovereign immunity, even where officers were nominally named as defendants, because the State was the real party in interest. Hence, this court is bound by *Will* to interpret the law consistent with those principles. Therefore,

Messrs. Haveman and Smedes cannot be sued under § 1983. As agents of the State, they cannot be held liable for Michigan's breach of its Medicaid contract with the federal government. Moreover, their employer, Michigan, as the only real party to the contract alleged to be in breach, is immune from suit. n16

----------Footnotes----------

n16 Construing § 1983 in accordance with the common law standards as they existed in 1871 is hardly novel, as the Supreme Court has done so on several occasions. *See, e.g., Will, 491 U.S. 58, 105 L. Ed. 2d 45, 109 S. Ct. 2304* (State not a "person"); *City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 69 L. Ed. 2d 616, 101 S. Ct. 2748 (1981)* (municipal immunity from punitive damages); *Pierson v. Ray, 386 U.S. 547, 18 L. Ed. 2d 288, 87 S. Ct. 1213 (1967)* (absolute immunity for state judges and "good faith and probable cause" defense for police officers); *Tenney v. Brandhove, 341 U.S. 367, 95 L. Ed. 1019, 71 S. Ct. 783 (1951)* (absolute immunity for state legislators).

----------End Footnotes----------

[89]**

Plaintiffs argue that the status of agency law in the 1870s is unclear, and that cases exist in which courts enjoined state officers to enforce state contracts. For this proposition, they cite only *Board of Liquidation v. McComb, 92 U.S. 531, 23 L. Ed. 623 (1875),* a case in which a bondholding private citizen successfully brought suit against state officers to enforce a State's obligations under the legislative act issuing the bonds. *Id. at 532-33.* But upon closer examination, *McComb* actually bolsters Michigan's position. This is so because the suit in *McComb* was allowed to proceed precisely because the statute under which the suit was brought expressly authorized a suit against the State if it failed to meet its obligations. *Id. at 537-*

38. If the Medicaid statute at issue in this litigation contained such an unambiguous authorization, Michigan and/or its officers could unquestionably be sued. But under the law controlling in 1871, absent such authorization, suits against States for contractual breach were barred, and § 1983 incorporates that prohibition.

Besides their unfounded reliance on *McComb*, plaintiffs' primary **[**90]** argument against this construction of § 1983 is that it has since been superceded by *Ex parte Young*, and that any suits seeking prospective injunctive relief may be brought against state officers acting in their official capacities. Indeed, they have placed great reliance on Footnote Ten of the *Will* opinion, which stated that "Of course a state official in his or her official capacity, when sued for injunctive relief, would be a person under § 1983 because official capacity actions for prospective relief are not treated as actions against the State. This distinction was commonplace in sovereign immunity doctrine and would not have been foreign to the 19th-Century Congress that enacted § 1983." *Will, 491 U.S. at 71 n.10* (internal citations and quotations omitted). As a general matter, plaintiff's endorsement of Footnote Ten is undoubtedly correct. However, use of the Court's generalized recognition fails to take account of the doctrine's limitations, which are contained in *Young, Ayers*, and their progeny, to which Footnote Ten specifically cites. As explained in Parts IV.A. and B., *supra*, plaintiffs' *carte blanche* construction of *Ex parte Young* **[**91]** is completely incongruous with the doctrine's twin requirements that (1) the official be acting *ultra vires*; and (2) that the duty to be performed be non-discretionary in nature. Neither condition exists with respect to Messrs. Haveman and Smedes' execution of the Medicaid statute (nor, for that matter, is there any "supreme" federal law at stake). And for purposes of this analysis, it matters not whether one considers these precepts of a constitutional nature or a mere historical iteration; the fact of the matter is that these strictures were part **[*579]** and parcel of the common law in 1871, and thus control the

statutory construction of § 1983. While plaintiffs are undoubtedly correct that § 1983 has been used countless times since 1871 to obtain prospective injunctive relief against state officials in their official capacities, plaintiffs fail to address the distinction between successful suits brought in tort where the individual's lawless act stripped him of the State's authority, and those unsuccessfully brought in contract where plaintiffs seek relief against individual officers where they still possess the mantle of the State's immunity, and moreover cannot be liable for the [**92] misdeeds of their principals. The distinction was crucial in 1871, and § 1983 incorporates it today under the doctrine enunciated in *Will*.

C. It is not Unambiguously Clear that Third-Party Donee Beneficiaries Could Sue for Breach of Contract in 1871

Section 1983 cannot possibly create a cause of action for third-party donee beneficiaries to a contract, because it is not unambiguously clear that such a right existed at the time the statute was enacted. To their credit, the respective counsels in this case have mustered significant authority on this question of whether a third-party donee beneficiary - *i.e.*, a beneficiary not owed money by the promisee - may sue a party in breach to enforce a contract made for his benefit. n17 It is undisputed that such a right generally exists today; it is greatly disputed whether such a right inhered in 1871.

----------Footnotes----------

n17 In their initial brief on this issue, plaintiffs cited numerous 19th Century cases for the proposition that the right of third-party beneficiaries to sue to enforce promises made by others was recognized in the 1870s at the time Congress enacted § 1983. In response, Michigan asserted that the cited cases did not concern donee beneficiaries, but instead involved suits by third-party creditor beneficiaries who were either related to the promisee or had themselves performed services

amounting to consideration. Such third-party creditors, Michigan acknowledges, did have the right to sue in 1870, but that was an exception to the general rule prohibiting third-party beneficiaries from bringing suit. Plaintiffs did not challenge Michigan's characterization of those initial citations in their later briefs, and the court's review of plaintiffs' cases confirms the State's analysis of the donee-creditor distinction.

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[93]**

Not being steeped in the intricacies of 19th Century contract law, this court (and perhaps counsel as well) is consigned to reviewing as best it can the historical sources proffered to it by the litigating factions. At the outset, the court must concede that the issue is not facially clear-cut, and that both sides have proffered language from authorities helpful to their respective positions. At a minimum, the number of sources, if not the weight of such authorities, appears to support Michigan's position that third-party donee beneficiaries could not sue the contracting parties in 1871. *See, e.g., Second Nat'l Bank v. Grand Lodge, 98 U.S. 123, 124-24, 25 L. Ed. 75 (1878)* (recognizing "the general rule that privity of contract is required" to support an action to enforce a contract); K. Teeven, *A History of the Anglo-American Common Law of Contract* 230 (1990) (explaining that "the rights of donee beneficiaries were not clearly established until *Seaver v. Ransom 224 N.Y. 233, 120 N.E. 639 Summary of the Law of Contracts*, 79 (2d ed. 1880) (noting that in the 1870s, the recognized rule was "that a person for whose benefit a promise was made, if not related **[**94]** to the promisee, could not sue upon the promise"); 1 W. Story, *A Treatise on the Law of Contracts* 509 (M. Bigelow ed. 1874) (noting "the tendency of the [American] courts" to hold that "no stranger to the consideration can take advantage of a contract, though made for his benefit"); *accord Blessing, 520 U.S. at 349-50* (Scalia, J., concurring) (stating that it "appears to have been the law at

the time § 1983 was enacted" that "the third-party beneficiary was generally regarded as a stranger to the contract, and could not sue upon it").

Plaintiffs, however, reject this characterization of the state of contract law *circa* **[*580]** 1871, and proffer that the two leading contract law treatise authors, Corbin and Williston, describe donee beneficiaries as having the right to sue promises during that period. Those scholars, and plaintiffs, rely in turn on the case of *Hendrick v. Lindsay, 93 U.S. 143, 23 L. Ed. 855 (1876).* The facts of *Hendrick* can be summarized as follows: Hendrick requested by letter that Lindsay to sign an appeal bond for him. Lindsay agreed to sign the bond, so long as Hendrick agreed to indemnify him if it were collected. Lindsay **[**95]** and Mansfield (apparently an associate of Lindsay's) signed the appeal bond and drafted an indemnity bond that they sent to Hendrick, stating that he would indemnify them if they ultimately had to pay on the appeal bond. Hendrick never signed the indemnity bond. Lindsay and Mansfield ended up having to pay on the appeal bond, and subsequently sued Hendrick for indemnification. The instant parties appear to agree on these factual predicates.

Plaintiffs rely on the following language from *Hendrick* for the proposition that donee beneficiaries could have brought suit in the 1870s:

> It is also argued, as Mansfield's name does not appear in the letters of Hendrick, that he could not join in this action. This would be true, if the promise were under seal, requiring an action of debt or covenant; but the right of a party to maintain assumpsit on a promise not under seal, made to another for his benefit, although much controverted, is now the prevailing rule in this country.

Hendrick, 93 U.S. at 149. Plaintiffs note that *Hendrick* nowhere limits the afore-quoted language to creditor beneficiaries, and conclude, therefore, that all classes of third-

party [**96] beneficiaries may sue the contracting parties. In addition, plaintiffs argue that Mansfield could not have been a creditor beneficiary of Lindsay's, because Lindsay would had to have owed Mansfield a duty that Lindsay intended to discharge by rendering performance of the indemnification agreement to Mansfield. Finally, plaintiffs assert that both Corbin and Williston describe Mansfield as a donee beneficiary. *See* Corbin on Contracts (1951) at 334; Williston, *Treatise on the Law of Contracts* § 37:11 at 96 and n.83.

As a textual matter, plaintiffs' interpretation of *Hendrick* does not withstand scrutiny. The unanimous *Hendrick* Court made it clear that it considered Hendrick to be desirous of "procuring a sufficient bond," but that "it was immaterial to Hendrick whether the bond was signed by one or more persons." *Hendrick, 93 U.S. at 148.* Additionally, the Court's analysis of the transaction also makes clear that Hendrick's letter to Lindsay was deemed to be an instruction to procure a bond without any limitation on whom the creditor(s) might be. *Id.* ("It is true that this promise, in terms, was to Lindsay; but there is no reason why it, any more [**97] than the request, should be limited. If the request applied, as we think it did, to the procurement of a sufficient bond, the promise has a like extent."). Hence, the quoted language upon which plaintiffs rely - though general when taken out of context - refers only to creditors, and stands only for the proposition that the state of the law at that time did not require promises made without seal to actually name the would-be-creditor. Indeed, plaintiffs' assertion that Mansfield was a donee beneficiary is belied by the fact that even the quoted language refers to him as a "party," something that a donee beneficiary most assuredly is not. *See id. at 149.* This observation concerning Mansfield's status negates plaintiffs' second argument as well; it is not the relationship between Lindsay and Mansfield that the Court is describing, but the relationship between Mansfield (one of two promisees) and Hendrick (the promisor).

Finally, as *amicus* MML points out, the expressed views of Corbin and Williston on third-party donee beneficiaries are more complex than plaintiffs represent. First, both Corbin (a self-described advocate of permitting third-party donee beneficiaries **[**98]** **[*581]** to sue, see Corbin, § 772 at 2-4) and Williston acknowledged that the common law right of donee beneficiaries to sue was a 20th Century development that altered the previous state of affairs. *See* Corbin § 772 at 4, § 782 at 81; Williston § 37:1 at 5, § 37:12 at 103, § § 7:1, 7:10, 7:11. Second, both Corbin and Williston define third-party donee beneficiaries as recipients of gifts who have not endowed a benefit upon the parties related to the gift, a description completely at odds with Mansfield's status in *Hendrick*; Mansfield provided a bond in exchange for the promise of an indemnity. *See* Corbin § 774 at 6; Williston § 37:7 at 35, n.67. Finally, neither Corbin nor Williston actually describe Mansfield as a donee beneficiary; rather, both authors refer to the *Hendrick* case in their respective discussions of the overall development of third-party beneficiary law. *See* Corbin § 831 at 334, § 832 at 340-42, n.20; Williston § 37:11 at 89, 95-96, n.83, § 37:10 at 83-89, n.55. In short, plaintiffs have failed to proffer any persuasive historical evidence that third-party donee beneficiaries had a common law right to sue in 1871. Rather, the law presented to **[**99]** the court leads only to the conclusion that no such right then existed. In accordance with Will's dictate that § 1983 be interpreted to reflect the "common-law principles" existing in 1871, the court finds that the statute affords third-party donee beneficiaries no right to sue the parties to the contract. Thus, § 1983 independently creates no right for beneficiaries of federal programs enacted pursuant to the Spending Power to sue the governmental entities or officers responsible for allocating those benefits. And even if one adopted the view of the state of the law surrounding § 1983's enactment that is most charitable to plaintiffs' interpretation, at best the feasibility of such donee suits would remain ambiguous, thereby falling short of the

"clear statement" required to impose upon a State a condition on the receipt of federal funds. *See, supra*, Part V.A.

D. Any Rights, Privileges, or Immunities Created Under the Medicaid Statute are "Secured" By State, Not Federal Law.

Aside from the construction of § 1983 demanded by *Will*, suits brought by the intended beneficiaries of federal-state cooperative agreements created under the Spending Power appear to fall outside **[**100]** the text of § 1983 itself. "Section 1983 provides a federal remedy for 'the deprivation of any rights, privileges, or immunities *secured* by the Constitution and laws.'" *Golden State Transit Corp. v. City of Los Angeles, 493 U.S. 103, 105, 107 L. Ed. 2d 420, 110 S. Ct. 444 (1989)* (emphasis added). The statute provides a remedy "against all forms of official violations of federally protected rights," whether violative of the Constitution or a federal statute. *Id. at 105-06* (internal citation and quotation omitted). But while § 1983 protects against violations of federal "rights, privileges, or immunities," it does not necessarily extend to protections against all violations of federal law. *Id. at 106.*

It may well be that the interests plaintiffs assert here under the Medicaid program are "rights, privileges, or immunities," but they are not "secured" by federal law. As is relevant here, the word "secure" means: "to put beyond hazard or losing or of not receiving: GUARANTEE < [approximately] the blessings of liberty to ourselves and our posterity - *U.S. Const.*>." Websters 3rd Int'l Dictionary (1976). n18 Under the ordinary **[**101]** meaning of the term, no interest is "secured" by the federal Medicaid statute. Upon its enactment, this federal law does not vest in a single American the right or privilege of receiving federally-subsidized **[*582]** medical care. As explained in Part III, *supra*, though passed by both houses of Congress and signed by the President, the Medicaid statute has no force of its own. It is only when a State, such as Michigan, accepts the Federal Government's offer and agrees to participate in the program that any benefits accrue to eligible

individuals. Even if such accrual is characterized as a "right, privilege, or immunity," it is not one guaranteed by federal law by being put beyond hazard of losing or not receiving. If Michigan elects not to participate in the Medicaid program, Congress's intended beneficiaries will not be aided with federal funds. And if Michigan, after having elected to participate, decides that it no longer wishes to do so, eligible individuals in the State will again not receive the federal aid. All of this is entirely consistent with federal law; the Federal Government gives States an ongoing choice, and it is entirely the States' prerogative whether to participate. **[**102]** In short, it is not federal law that "secures" Medicaid rights (to the extent they might be so attributed), but state law. Section 1983 does not secure rights created under state law, and therefore is inapplicable to any such rights created under the Medicaid program.

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n18 The optimal definition of the term "secure" would be from a dictionary published *circa* 1871, but this court does not have such sources available to it. There is no reason to believe, however, that this definition is incorrect, as it comports with the original understanding that individuals be enabled to sue to protect their federally-defined civil liberties. *See Will, 491 U.S. at 66.*

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VI. Whether This Court's Rulings are Foreclosed by Precedent.

Plaintiffs assert that as a matter of binding legal precedent, suits brought pursuant to § 1983 against state officers for non-compliance with programs enacted under the federal Spending Power are permitted, and that numerous Supreme Court and Sixth Circuit opinions have held **[**103]** as much. In particular, they rely on *Rosado v. Wyman, 397 U.S. 397, 25 L.*

Ed. 2d 442, 90 S. Ct. 1207 (1970); Maine v. Thiboutot, 448 U.S. 1, 65 L. Ed. 2d 555, 100 S. Ct. 2502 (1980); Wright v. City of Roanoke Redevelopment and Hous. Auth., 479 U.S. 418, 93 L. Ed. 2d 781, 107 S. Ct. 766 (1987); and *Wilder v. Virginia Hosp. Ass'n, 496 U.S. 498, 110 L. Ed. 2d 455, 110 S. Ct. 2510 (1990).* While acknowledging that the cases cited by plaintiffs involve the use of § 1983 by private parties to enforce federal legislation enacted pursuant to the Spending Power, Michigan notes that two other lines of Supreme Court authority - upon which this court relied in its foregoing analyses - have developed concurrently with those cases cited by plaintiffs. First, the Supreme Court has made clear that Spending Clause legislation is contractual in nature and may not be interpreted to impose duties or liabilities upon States absent a clear statement of congressional intent. *See, e.g., South Dakota, 483 U.S. 203, 97 L. Ed. 2d 171, 107 S. Ct. 2793 (1987); Pennhurst I, 451 U.S. 1, 67 L. Ed. 2d 694, 101 S. Ct. 1531 (1981).* **[**104]** Second, the Court has specifically applied the clear statement requirement to the construction of § 1983 where Congress intends to alter the traditional constitutional balance between the States and the Federal Government, and determined that the clear statement rule applies with particular force to congressional Spending Power enactments. *Will, 491 U.S. at 65 (1989).* In the absence of such clear statements, the common law as it existed in 1871 controls the interpretation of § 1983. *Id. at 67.* No federal court, Michigan suggests, including the Supreme Court, has yet attempted to reconcile these divergent lines of authority.

This court has discussed at length the merits of Michigan's arguments and found them to be correct expositions of current controlling law as to the specific issues presented. What remains is for the court to consider whether plaintiffs are correct in asserting that such legal conclusions are precluded by other Supreme Court or Sixth Circuit precedent. An iteration of a few basic interpretive principles of what constitutes binding precedent is in order. To begin, when the

Supreme Court assumes, *sub silentio*, questions of jurisdictions **[**105]** in a case, then it is not bound by those assumptions in subsequent cases. *See Will, 491 U.S. at 63 n.4; Hagans v. Lavine, 415 U.S. 528, 533-35 n.5, 39 L. Ed. 2d 577,* **[*583]** *94 S. Ct. 1372 (1974)* (collecting cases); *United States v. More, 7 U.S. 159, 172, 2 L. Ed. 397 (1805).* Similarly, an assumption by the Court that a particular cause of action exists does not constitute a decision that it does. *See Burks v. Lasker, 441 U.S. 471, 476 n.5, 60 L. Ed. 2d 404, 99 S. Ct. 1831 (1979); Hagans, 415 U.S. at 533 n.5.* Finally, isolated statements in the Court's opinions that do not squarely address and resolve the issue mentioned also do not constitute binding precedent. *See Alden, 527 U.S. at 735-38.* And though the conclusion seems obvious, where the Court has not definitively spoken to an issue, it remains an open question subject to interpretation by the lower federal courts. *See Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 229, 131 L. Ed. 2d 328, 115 S. Ct. 1447 (1995).*

Therefore, the Supreme Court's decisions - and for that matter, any court's decisions - decide only the legal **[**106]** issues that they specifically purport to decide. That there may be other assumptions, analyses, and language contained in those decisions may be of great utility for courts deciding future cases, but such conditions and language do not constitute binding precedent.

Upon turning to the cases upon which plaintiffs characterize as binding precedent, it appears that while the cases certainly lend support to plaintiffs' position, they have no binding precedential value as to the issues addressed in this opinion. For example, *Rosado*, the 1970 case that plaintiffs claim establishes their right to bring the instant cause of action under § 1983, says nary a word about sovereign immunity, *Ex parte Young*, the Spending Power, or, for that matter, § 1983 itself. Instead, *Rosado* addresses the substance of New York's implementation of the Aid to Families With Dependent Children program and the decisions made by the district court under the peculiar procedural posture of the case. The

underlying (but unstated) assumption of the case is that the Court has jurisdiction, and that a cause of action exists, but the Court's opinion addresses neither issue. *Rosado*, then, does not illuminate [**107] the issues presented here.

Better support for plaintiffs' position is found in *Thiboutot, Wright*, and *Wilder*. *Thiboutot* held that as a general matter, § 1983 provides a right of action to enforce not only constitutional rights, but federal statutes, including those outside the realm of civil rights. *Wright* and *Wilder* effectively put the meat on Thiboutot's bare bones by establishing a three-pronged test for determining when a substantive federal statute creates a private cause of action that is enforceable under § 1983 (referred to hereafter as the "*Wright-Wilder*" test). In each of those three cases, the substantive federal statutes at issue were enacted pursuant to the Spending Power, but in none of the cases did the Court address the constitutional or statutory construction limitations on Congress in imposing such programs. Indeed, there is no better illustration than *Thiboutot* of assumptions in an opinion not necessarily reflecting the law. In that case, the Court assumed that the defendant State was a "person" under § 1983, an assumption later squarely rejected in *Will. 491 U.S. at 66.* Likewise, *Alden* flatly rejected Thiboutot's [**108] assumption that a State's Eleventh Amendment immunity did not extend to suits in the State's own courts. *527 U.S. at 737.* The non-binding nature of "assumptions" similarly controls here. The fact that all three cases assumed § 1983 to automatically create a mechanism permitting suits against state officers for violations of Spending Power programs is simply not dispositive as to what the statute necessarily permits. Nor do the three cases provide insight as to the effect of sovereign immunity, *Ex parte Young*, or any other subjects neither mentioned nor ruled upon. n19

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n19 The same holds true for the many cases from the Sixth Circuit and other courts proffered by plaintiffs in which §

1983 has been used to enforce "rights" created under federal-state Spending Power programs against States or their officers; none of those have addressed any of the specific arguments raised here.

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[*584] However, speaking specifically to how § 1983 is to be construed for any cause of action, the Court in *Will* enunciated **[**109]** two important principles that are relevant here: (1) that it is to be construed in accordance with the common law as it existed in 1871; and (2) that it fails as a "clear and manifest" indication to impose a condition upon the States for the receipt of federal funds. *491 U.S. at 67, 65* (internal citations omitted). In addressing the effect of § 1983 on federal-state programs enacted pursuant to the Spending Power, the Court could not have been more clear:

In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has, in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision.

Id. at 65 (internal citations and quotations omitted). *Will* holds that whatever else § 1983 may be, it is not by itself a "clear statement" demonstrating an intent to alter the federal-state balance. *Id.*

In shorthand form, one can think of the *Thiboutot-Wright-Wilder* trilogy as answering the question of how a court is to construe which substantive federal statutes create "rights, privileges, or immunities" within the ambit of § 1983, while **[**110]** *Will* provides a framework for answering the enforcement question of who can be sued and what kinds of relief may be authorized under § 1983. Indeed, *Pennhurst I* made this very distinction between substantive rights and enforceability. *451 U.S. at 28 n.21.* n20 Thus, the train of

analysis as applied in the instant case may be summarized as follows: *Pennhurst I* and *South Dakota* require that if Congress intends to impose any condition on the receipt of federal funds by a State, that the condition be a "clear statement" expressed in unambiguous terms. *See Pennhurst I, 451 U.S. at 9, 16; South Dakota, 483 U.S. at 207.* The Medicaid statute contains no such clear statement requiring that either a State or its officers be subject to suit if the State fails to comply with the terms of the program. *Will* holds that § 1983 is itself not a clear statement that can impose conditions upon a State's exercise of its powers beyond those that existed in 1871. *Will*, at 65, 67. No such right existed in 1871 at common law to sue a State or its officers for a failure to properly implement a governmental program. Hence, neither § 1983's **[**111]** express terms nor its historical construction authorizes **[*585]** such suits. n21 In the absence of any clear statement requiring submission by States or their officers to suit as a condition of receiving federal Medicaid funds, no such suit may be brought.

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n20 **This court would be remiss in not acknowledging two post-*Wilder* Supreme Court cases in the § 1983/Spending Power program area. In *Suter v. Artist M., 503 U.S. 347, 118 L. Ed. 2d 1, 112 S. Ct. 1360 (1992)*, the Court held that the federal-state Spending Power program at issue did not create rights enforceable by private parties under § 1983.** The decision resulted in some confusion among the lower federal courts; for while the Court invoked the *Wright-Wilder* principles for determining whether a "right" enforceable by § 1983 exists, and also invoked *Pennhurst* I's "clear statement" rule as a barrier against enforcing indiscrete statutory provisions against States, the Court's mode of analysis left unclear whether *Wilder-Wright* remained the appropriate framework for making such determinations. However, five years later, in *Blessing v. Freestone, 520 U.S. 329, 137 L. Ed. 2d 569, 117 S. Ct. 1353 (1997)*, the Court

reaffirmed the validity of the *Wright-Wilder* test when it rejected the enforceability under § 1983 of yet another federal-state Spending Power program provision. In that case, as alluded to earlier in this opinion, the question of whether third-party donee beneficiaries could bring suit under § 1983 was raised. Contrary to plaintiffs' assertions in the instant case, the majority opinion did not reject the argument, as it did not address it at all. *See Blessing, 520 U.S. at 350* (Scalia, J., concurring) (noting that the Court's ruling leaves open the possibility that third-party donee beneficiary suits do not lie under § 1983). **[**112]**

n21 Though admittedly not necessary to the decision here, *amicus* MML suggests that *South Dakota* (or principles of contract interpretation) might even prohibit a general federal statute requiring that States subject themselves or the officers to suit as a condition for receiving federal funds for any program. *See South Dakota, 483 U.S. at 207, 208 and n.3* (noting that conditions on federal grants might be illegitimate if unrelated to the purpose of the spending program at issue). Because § 1983 is not such a general authorization, there is no need for this court to address whether Congress might pass such a statute in lieu of doing so on a program-specific basis.

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VII. Other Arguments

A few remaining points warrant mention. First, plaintiffs suggest that by consenting to § 1983 suits in the past against its officers for alleged violations of the federal Medicaid program, Michigan has implicitly recognized that its officers are amenable to such suits. It should be remembered, however, that under both *Ex parte Young* and the statutory construction of § 1983, **[**113]** state officers retain the cloak of the State's sovereign immunity when implementing programs authorized by Congress under the Spending Power. And in *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.,*

527 U.S. 666, 119 S. Ct. 2219, 2226, 144 L. Ed. 2d 605 (1999), the Supreme Court squarely rejected the notion that a State could "impliedly" or "constructively" waive its immunity from suit based on its past behavior. As the Court further explained:

A State's sovereign immunity is "a personal privilege which it may waive at its pleasure." *Clark v. Barnard, 108 U.S. 436, 447, 27 L. Ed. 780, 2 S. Ct. 878 (1883).* The decision to waive that immunity, however, "is altogether voluntary on the part of the sovereignty." *Beers v. Arkansas, 61 U.S. 527, 20 HOW 527, 529, 15 L. Ed. 991 (1858).*

Id. There must be, the Court held, "a 'clear declaration' by the State of its waiver [] to be certain that the State in fact consents to suit." *119 S. Ct. at 2228.* Hence, the fact that Michigan may have exercised its privilege in the past and consented to suit in other cases is irrelevant to the instant matter. In the absence **[**114]** of a clear declaration by Michigan in the case at bar that it has waived its sovereign immunity, and by extension, the immunity of its officers, it cannot be subjected to suit.

Another point warranting brief mention revolves around plaintiffs' supposition that the legislative history of the Medicaid Act and its subsequent amendments are demonstrative of Congress' intent that states participating in the Medicaid program be subject to private suit. For this supposition, they rely on *Cannon v. University of Chicago, 441 U.S. 677, 60 L. Ed. 2d 560, 99 S. Ct. 1946 (1979),* which reiterated the well-known proposition that in determining whether a given substantive federal statute is intended to create a private cause of action, legislative history must be considered. *Id. at 694.* Plaintiffs are most assuredly correct in that assertion, as confirmed by the *Wright/Wilder* tripartite test for determining when Congress intended federal statutes to create a privately enforceable right. However, plaintiffs' argument misses the mark where either sovereign immunity or

a clear statement rule is concerned. Both are here. As the Court has held:

Waivers of **[**115]** . . . sovereign immunity, to be effective, must be unequivocally expressed. . . .They are not generally to be liberally construed. . . .The Government's consent to be sued must be construed strictly in favor of the sovereign, and not enlarged beyond what the language requires.

United States v. Nordic Village, 503 U.S. 30, 33-34, 117 L. Ed. 2d 181, 112 S. Ct. 1011 (1992) (internal citations and punctuation omitted). The unequivocal expression eliminating sovereign immunity must be contained in the statutory text; if such **[*586]** clarity does not exist, it cannot be inferred from the statute's legislative history. *Id. at 37.* "Resort to legislative history is only justified where the face of the Act is inescapably ambiguous." *Garcia v. United States, 469 U.S. 70, 76 n.3, 83 L. Ed. 2d 472, 105 S. Ct. 479 (1984)* (internal citation and quotation omitted). By definition, an "inescapably ambiguous" statute is also not a "clear statement" that "unambiguously" expresses congressional intent that a State or its officers be subject to suit. Hence, waivers of sovereign immunity cannot be accomplished by judicial construction from legislative history. **[**116]** The statute must speak for itself. Here, neither the Medicaid statute nor § 1983 contain such a statement, and Michigan and its officers thus retain their immunity from suit, and have not knowingly consented to private causes of action as a condition of participating in the Medicaid program.

Similarly, plaintiffs maintain that congressional silence in the face of repeated federal court decisions authorizing private causes of action under the Medicaid program against state officers requires a conclusion that such decisions are consistent with congressional intent. The argument is farfetched on its face; there is little or no institutional intent to be divined from congressional inertia, and courts are incompetent to do so. The

reasons that Congress may choose to act or to refrain from acting are probably more numerous than its members, and there is no judicially-cognizable intent derivable from a political institution's failure to act. *See Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164, 186, 128 L. Ed. 2d 119, 114 S. Ct. 1439 (1994).* As the *Central Bank* Court explained:

Respondents infer that these Congresses, by silence, **[**117]** have acquiesced in the judicial interpretation of [the statute]. We disagree. . . .Our observations on the acquiescence doctrine indicate its limitations as an expression of congressional intent. It does not follow that Congress' failure to overturn a statutory precedent is reason for this Court to adhere to it. It is impossible to assert with any degree of assurance that congressional failure to act represents affirmative congressional approval of the courts' statutory interpretation. Congress may legislate, moreover, only through the passage of a bill which is approved by both Houses and signed by the President. Congressional inaction cannot amend a duly enacted statute.

Id. at 186 ("We walk on quicksand when we try to find in the absence of corrective legislation a controlling legal principle") (internal citations and punctuation omitted). Courts may attempt divine congressional intent only from what Congress does, not from what it does not do. That Congress has done nothing in response to court decisions assuming that particular causes of action exist provides no instruction as to whether they actually do; the answer lies in the statute. Here, the statute **[**118]** in question - § 1983 - contains no such authorization.

Finally, the court mentions plaintiffs' reliance on *Bell v. New Jersey, 461 U.S. 773, 76 L. Ed. 2d 312, 103 S. Ct. 2187 (1983),* for the proposition that so long as Congress makes clear a State's obligations under a joint program enacted pursuant to the Spending Power, Congress need not make clear

how such obligations are to be enforced. Notwithstanding that Supreme Court cases such as *South Dakota* would have superceded such a rule, plaintiffs' interpretation of *Bell* fails to withstand scrutiny. In fact, the Court in *Bell* found that Congress had, consistent with *Pennhurst I*, been clear in the Spending Power statute at issue that the federal government could administratively recoup misspent funds from the State. *Id. at 790 n.17, 791* (noting that the statute "clearly assigned" the auditing and recoupment powers to the Secretary of Education). Interestingly, it is this last of plaintiffs' arguments that suggests a resolution to the problem presented by this suit. None of the constitutional or statutory construction issues addressed here prevent **[*587]** Congress from creating a private cause **[**119]** of action against States or their officers for failure to comply with federal-state contracts created pursuant to the Spending Power. Far from it. If Congress wishes to make states and/or their officers subject to private suit as a condition of receiving federal funds, it need only say so unequivocally in the statute authorizing the program. n22 Once faced with the "clear statement" that a condition of program participation is amenability to private suit, a State could make a "knowing" choice as to whether to participate. If it so chooses, then both parties to the contract will be clear as to its terms, including the means of redress for breach. A "clear statement" is all that is required.

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n22 Indeed, plaintiffs suggest that Congress has already done something similar on at least two occasions in reaction to Supreme Court decisions holding, on grounds other than those presented in the instant suit, that no private cause of action lay. *See 42 U.S.C. § 1320a-2* (intended to overrule any legal effect in *Suter v. Artist M.* upon the previous *Wright/Wilder* test for evaluating whether privately enforceable rights were created by substantive federal statutes); *20 U.S.C. § 1415*(l) (overruling the Court's decision in *Smith v. Robinson, 468 U.S.*

992, 82 L. Ed. 2d 746, 104 S. Ct. 3457 (1984), holding that the comprehensive scheme contained in the statute in question precluded private § 1983 actions to protect rights contained in the statute).

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VIII. Conclusion

Because the Medicaid program at issue is the result of a voluntary contract between two sovereigns - Michigan and the Federal Government - it is not of the same legal nature as actions by the Federal Government in its capacity as the supreme sovereign compelling behavior by individual citizens. The terms of the agreement are set out in the Medicaid statute, which is enacted pursuant to the Constitution's Spending Power, and the obligations a State assumes as a result of its acquiescence are no greater than those expressly set forth in the statute. The constitutionally consensual nature of the contractual agreement means that unlike federal laws enacted pursuant to other constitutionally-enumerated powers, it is not the supreme law of the land. When state officers charged with carrying out these contracts do not act *ultra vires*, they are legally indistinguishable from the State, which is the only party to the contract, and they retain the State's constitutional sovereign immunity from suit. Such is the case here. Moreover, the Medicaid program at issue here not only vests discretion in the implementing officers, but contains its own specific, congressionally-mandated [**121] remedies for its violations. For all of these reasons, the doctrine of *Ex parte Young* is unavailable to plaintiffs. Michigan and its officers retain their constitutional immunity from suit, and this court accordingly lacks jurisdiction.

The same result would obtain even if there were no infirmity of constitutional sovereign immunity depriving the court of jurisdiction. This is so because there is no cause of

action available against Michigan or its officers. Where federal-state contracts enacted pursuant to the Spending Power are concerned, § 1983 operates as neither a cause of action against a State, even if the *Young* doctrine were applicable, nor as a voluntary waiver of a State's sovereign immunity where *Young* is inapposite. In order for Congress to impose a condition upon a State in return for receipt of federal funds, such a condition must be unambiguously set forth as a clear statement in the program statute. No such clear statement is contained in § 1983, the statue that plaintiffs claim grants them a private cause of action against the State's officers to enforce the terms of the Medicaid program. The statute's express terms contain no such language that would **[**122]** put a State on notice. And as a matter of historical statutory construction, which the Supreme Court requires in construing § 1983, no such clear, unambiguous intent to subject States to private suit may be found. Third-party donee beneficiaries lack standing to sue for the State's contractual breach under **[*588]** § 1983. And § 1983 preserves not only the sovereign immunity of a State and its officers from suit for the State's contractual breach, but also recognizes that as agents of the State, officers may not be held to answer for their principal's contractual breach. Moreover, by its terms, § 1983 appears not to protect rights under Spending Power programs that are "secured" by state, rather than federal law. Finally, events outside the statute, such as a State's past voluntary submission to suit, legislative history, or congressional inaction, cannot be used to manufacture a "clear statement" within a Spending Power program statute to create an obligation upon a State that is not expressly contained in the statutory language. Simply put, § 1983 does not operate as "clear statement" imposing the obligation upon a State that it submit to private enforcement actions for violations of **[**123]** federal-state contract terms.

Strong democratic, federalism and federalism policy n23 concerns undergird these strictures. Congress is presumed to say what it means in the language of a statute. When courts are

forced to guess at legislative intent, it increases the risk of laws being created that the people as ultimate sovereign had no intention of enacting. The risk doubles where two sovereigns are concerned. Here, it is not only the people of the United States as represented in the Federal Government, but the people of each individual State as represented by their legislatures and executive branches, whose consent is required. The Federal Government could have imposed the Medicaid program directly without the aid of the States, but it choose not to. Instead, it elected to offer a purely voluntary program in which each State was given the choice to participate. If that choice, exercised by the democratically-elected political branches of each State, is to be meaningful, all of the program participation conditions must be clear. It is the State, after all, that will bear the burden of implementation, as a matter of money, management, and diverted resources. In order for a State to **[**124]** effectively evaluate the "cost" (in the broad sense) of its participation, and to compare it with the expected "benefit" (both direct and psychic), then it must know exactly what the burdens will be. Whether it will be subject to suit by private plaintiffs, and have its treasury and officers at the mercy of a federal court, is surely an important consideration in deciding whether to participate. Such a burden is undoubtedly far more potentially onerous than an administrative denial of future funds by the Secretary of HHS. This is not to say that a State may not have such conditions imposed upon it, but is only to say that it must know unambiguously what those conditions are.

----------Footnotes----------

n23 "Federalism policy" here refers to the political philosophy that might animate a congressional decision to act or refrain from acting in these spheres, as compared to the concept of "federalism" that desribes the very structure of the relationship between the federal government and the several states.

----------End Footnotes----------

Nor are plaintiffs without recourse. **[**125]** For any medical services they allege to have been wrongfully denied, they may avail themselves of the internal administrative appeals process contained in the program. They may also exercise their First Amendment rights to petition the political actors responsible for this program: For example, they could request that the HHS Secretary cut off Michigan's funds for its asserted breach; they could lobby Congress to take similar steps by legislative means; furthermore, they can petition Michigan's legislature to create a cause of action permitting private suits against the State for its failure to comply with the Medicaid program terms; or they could lobby Congress to condition participation in the Medicaid program, or perhaps even all federal-state contracts, upon the States agreeing to submit to private causes of action for non-compliance with the contract terms. It is for the citizens of the respective sovereigns to decide through their elected representatives what the contours **[*589]** of governmental programs will be. And while permitting such causes of action against the States and their officers to enforce Spending Power programs might be desirable public policy, the law as it exists today **[**126]** does not authorize it.

For the foregoing reasons, Defendants' motion to dismiss is granted, and Plaintiffs' Motion for Class Certification is rendered moot, accordingly,

Plaintiffs' "Motion for Class Certification" is DENIED and

Plaintiffs' Complaint is DISMISSED WITH PREJUDICE.

ROBERT H. CLELAND

UNITED STATES DISTRICT JUDGE

March 26, 2001

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

WESTSIDE MOTHERS, et al.,

Plaintiffs,

Case No: 99-CV-73442-DT

v.

James K. Haveman, et al,

Defendants.

_____/

ORDER DISMISSING ORGANIZATIONAL PLAINTIFFS MICHIGAN AAP, MICHIGAN AAPD, MLHS, & MWRO FOR LACK OF STANDING

I. Background

Pending before the court is defendants' November 9, 1999 "Motion for Judgment on the Pleadings Against Organizational Plaintiffs," to which plaintiffs responded on November 23, 1999. In this case, plaintiffs filed a five-count complaint seeking injunctive relief and the appointment of a special master to end the alleged systemic deprivation by the defendants ("Michigan" or "the state") of Early and Periodic Screening, Diagnosis, and Treatment Services ("EPSDT services") under the state's Medicaid program (also known as "Medical Assistance"). Plaintiffs consist of eight individuals named as would-be class representatives on behalf of all present and future EPSDT service-eligible children in

Michigan, as well as six organizations asserting interests in the proper implementation of the EPSDT program. Plaintiffs bring this case under 42 U.S.C. § 1983, claiming that Michigan has failed to provide EPSDT services mandated by 42 U.S.C. § 1396, *et seq.*, to the class of all Michigan children eligible for those services.

Michigan argues that the six organizational plaintiffs lack standing to bring this suit and, therefore, should be dismissed. This order addresses only the issue of whether the plaintiff organizations have standing as organizations, and not whether they have standing for any other purpose. As summarized from plaintiffs' complaint, the organizational plaintiffs are as follows:

Plaintiff Michigan Chapter of the American Academy of Pediatrics ("AAP") is a non-profit organization of Michigan pediatricians, whose mission is to attain "optimal physical, mental, and social health for all infants, children, adolescents and young adults." (See Complaint ¶ 15). This mission includes increasing access to health care for low-income children, and specifically, EPSDT services. Id. AAP alleges that Michigan's failure to meet the state's EPSDT obligations has "imposed otherwise unnecessary expenditures of organizational resources upon the AAP." *Id.* AAP does not specify the nature of those impositions.

Similarly, plaintiff Michigan Chapter of the American Academy of Pediatric Dentists ("AAPD") is a non-profit organization of Michigan pediatric dentists whose mission is to "improve and maintain the oral health of infants, children adolescents, and persons with special needs." (See Complaint ¶ 16). Its mission includes "promoting policies that increase access to oral health care for low-income children." *Id.* The AAPD alleges that Michigan has failed to provide required EPSDT periodic and comprehensive dental examinations and treatment to eligible children, thereby imposing "otherwise

unnecessary expenditures of organizational resources upon the AAPD." *Id.* The AAPD also does not specify the nature of those impositions.

Plaintiff Michigan League of Human Services, ("MLHS") is an association of Michigan individuals and organizations dedicated to "education, research and advocacy for the benefit of low-income and other vulnerable citizens" in Michigan. (See Complaint ¶ 17). It is an advocacy organization whose purpose is to "identify and help solve basic health and social welfare problems in Michigan and to advocate for the provisions of cost effective and coordinated preventative and remedial human services by public and private services sectors which are adequate to meet the need." *Id.* as related specifically to the instant case, MLHS advocates the "well-being of children," and produce studies of data and policies related to that goal, including EPSDT services. *Id.* In the complaint, MLHS alleges no harm caused to it by Michigan. However, like the other organizational plaintiffs, MLHS claims in its brief that "it has been injured by defendants' actions because it has been forced to expend additional resources to monitor defendants' compliance with the Medicaid Act." (See Pl. Resp. Br. At 4-5).

Plaintiff Families on the Move ("FOM") is a non-profit organization composed of foster parents, adoptive parents, and biological parents of special needs children throughout Michigan. (See Complaint ¶ 18). FOM provides support, information, and advocacy to, and on behalf of, such families. Id. FOM alleges that all of the adoptive and foster children in the care of its members are Medicaid-eligible, and that because of the state's alleged failure to provide the mandatory EPSDT services, FOM's members have incurred additional costs in providing care in accordance with state mandates that they provide the children with certain types of medical care, or that they have been unable to fulfill those mandates because of the state's failure to meet its own obligations. *Id.* FOM also

claims that the state's actions (or lack thereof) have imposed upon it "unnecessary expenditures of organizational resources," through FOM does not specify what those expenditures are. *Id.*

Plaintiff Michigan Welfare Rights Organization ("MWRO") is an unincorporated association of other Michigan welfare rights organizations, which are themselves composed of Medicaid-eligible families, including children allegedly in need of EPSDT services. (See Complaint ¶ 19). MWRO states nothing else about itself or its claims, except that Michigan's allegedly unlawful activities have "imposed otherwise unnecessary expenditures of organizational resources" upon it. *Id.*

Finally, plaintiff Westside Mothers is a non-profit welfare rights organization, the majority of whose members are allegedly Medicaid-eligible and in need of EPSDT services. (See Complaint ¶ 20). Westside Mothers makes not other description of itself or its allegations of specific injury, though a fair reading of the complaint as whole indicates that it alleges that its members are being unlawfully deprived of EPSDT services that Michigan is obligated to provide.

II. Discussion

The court will first address the requirements of constitutional standing and why plaintiffs MLHS and MWRO fail to meet them. Second, the court will assume for purposes of the pending motion, and based only on the bare pleadings, that plaintiffs AAP and AAPD may meet the minimum constitutional standing requirements, but then explain why they cannot meet the prudential standing requirements for associations. Finally, the court will briefly address why it appears – again, based solely on the contents of the complaint – that plaintiffs FOM and Westside Mothers meet the requirements for associational standing.

A. Constitutional Standing

"Article III of the Constitution confines the federal courts to adjudicating actual 'case' and 'controversies.' *National Rifle Ass'n v Magaw*, 132 F.3d 272, 279 (6th Cir. 1997) ("NRA'0 (internal citations and quotations omitted). A litigant must have "standing" to invoke the jurisdiction of the court. Id. Standing consists of three elements: (1) injury in face' (2) that the injury can reasonably be construed as having been caused by the defendant's challenged action; and (2) that the injury can likely be redressed by a favorable decision. See *Cleveland Surgi-Center, Inc. v. Jones*, 2 F.3d 686, 688, (6th Cir. 1993) (internal citations and quotations omitted). At base, the standing doctrine requires that a plaintiff "show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant." Id. The doctrine exists to avoid "converting the judicial process into no more than a vehicle for the vindication of the value interests of concerned bystanders." *United States v. St. Luke's Episcopal Hosp.*, 982 F. Supp. 1261, 1263 (S.D. Tex. 1997), citing *Valley Forge Christian College v. American United for Separation of Church & State, Inc.*, 454 U.S. 464, 473 (1982) (internal citations and quotations omitted).

The first requirement – "injury in fact' – requires that there have been "an invasion of a legally protected interest which is (a) concrete and particularized; and (b) actual and imminent, not conjectural or hypothetical." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (internal citation and quotations omitted). A "particularized" injury is one that "must affect the plaintiff in a personal and individual way." *Id.*, at 560 n.1.

> The "injury-in-fact" test requires more than simply an injury to a cognizable interest. It requires that the party seeking review be

> himself among the injured. In addition, the court must look to the substantive issues of the case to determine whether there is a logical nexus between the status asserted and the claim sought to be adjudicated.

St. Luke's, 982 F. Supp. At 1236-64 (internal citations and quotations omitted).

The Plaintiffs that are subject to the instant motion are associations. "[A]n association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right;[3] (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit," NRA, 132 F.3d at 294, citing *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977).

The court will accept for the sake of argument that the organizational plaintiffs meet part (c) of the *Hunt* test; however as associations, they must still make factual allegations in their complaint sufficient to demonstrate that the organizational interests are germane and that their members would themselves have standing to bring this suit. See *Hunt*, 432 U.S. at 343; *Lujan*, 504 U.S. at 561 (internal citations and quotations omitted). Under these criteria, plaintiffs MLHS and MWRO each lack constitutional standing to bring this suit.

MLHS has pled no facts alleging that its members have suffered an "injury-in-fact;" in fact, MLHS failed to plead any

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[3] For purposes of considering the plaintiff organizations' standing, the court assumes that plaintiffs' complaint has adequately pled the requisite individual standing requirements. However, the court makes no actual finding as to that issue in this order.

injury at all, thought it did later allege in its brief that Michigan's unlawful actions had "forced" it to expend additional resources to monitor Michigan's compliance with the Medicaid act.[4] As an initial matter, MLHS does not even claim that its individual and organizational members would themselves have standing to bring this suit; MLHS is an advocacy organization, and not involved in the provision or receipt of Michigan Medicaid services. Hence, it does not meet *Hunt's* first requirement for associational standing.

Second, MLHS has alleged no "injury," as observing the actions of government and gathering information are not, by themselves, legally cognizable injuries. Even assuming, *arguendo*, that there were an injury, that injury was certainly not "forced" upon MLHS by the defendant. MLHS's compliance monitoring activities are purely voluntary, and not the result of any compulsion on the part of Michigan. Now would such an injury be redressable. The court is aware of no support in Anglo-American jurisprudence for the proposition a party can unilaterally take upon itself a responsibility that ostensibly benefits a second party and then demand that a third party with whom the first party has not legal relationship accept responsibility for the first party's actions. In fact, MLHS does not even request such relief in this suit, as there is no request for damages to defray the (presumed) costs of its monitoring.[5] MLHS cannot possibly have constitutional standing to bring suit; indeed, MLHS is precisely the kind of

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[4] It is extremely doubtful that plaintiffs can rely on statements in their briefs to substitute for the standing predicates required to be in the complaint. There is, however, no need for the court to make that determination here.

[5] Though it is not required to decide the instant motion, the court assumes that MLHS will continue its activities even if all of the relief requested in this suit were to be granted, which would further demonstrate that it is not Michigan's actions that have caused the claimed "injury" to MLHS.

public policy advocate whose concerns should be aired in the political branches of government, and not to the judiciary. *See, e.g. Valley Forge*, 454 U.S. 464.

MWRO lacks constitutional standing for reasons virtually opposite to those precluding MLHS. Plaintiffs' complaint provides virtually no information about MWRO. The court is completely unable to determine whether MWRO meets part (b) of *Hunt's* associational standing requirement; namely, that MWRO be seeking to protect interests that are germane to its purpose. The court cannot make that determination because the complaint does not indicate what MWRO's purpose is. Moreover, MWRO concedes that *its* members do not themselves have standing to bring this suit, as MWRO is an organization of organizations. Plaintiffs claim that because MWRO's subsidiary organizations have Medicaid-eligible members, MWRO possesses vicarious standing to represent these individuals. However, there are no factual allegations in the complaint as to the nature of those subsidiary organizations that would provide a basis for the court to determine whether those organizations themselves meet the associational standing requirements. Furthermore, plaintiffs have proffered no support for the proposition that associational standing can be conferred by such tenuous relationship between an association and the twice-removed constituent individuals upon whom the asserted standing rests. While the mind can certainly conjure up circumstances in which such standing might be found, plaintiffs have utterly failed to assert facts that might demonstrate "a logical nexus between the status asserted and the claim sought to be adjudicated."

Finally, plaintiffs have not asserted any concrete and particularized injury that has been inflicted upon MWRO's (vicarious) individual members that relates to the organization's unknown purpose – instead, plaintiffs simply make a generalized claim that MWRO as an *organization* has

suffered "otherwise unnecessary expenditures of organizational resources." Whatever the nature of those undefined expenditures, given that the standing asserted here relies on the underlying Medicaid-eligible individuals, it is only the individual's injuries, and not those of the organization, that can create the requisite "injury-in-fact." In other words, while plaintiffs may have set forth facts sufficient to demonstrate injury to the class of individual Medicaid recipients, there is nothing in the complaint demonstrating their relationship to MWRO. Accordingly, MWRO lacks constitutional standing. *See, e.g. Equality Foundation of Greater Cincinnati, Inc., v City of Cincinnati*, 54 F.3d 261, 271 (6th Cir. 1995) (housing rights organization lacked standing where it failed to assert actual or imminent injury from implementation of statute, and had only asserted abstract and hypothetical potential injury unrelated to any real individual).

B. Prudential Standing

The court will assume for purposes of the present motion that the remaining four organizational plaintiffs – AAP, AAPD, FOM, and Westside Mothers – meet the constitutional minimums for standing. However, in addition to the constitutional standing requirements,

> [p]rudential requirements also bear on standing, including the general requirement that (1) a plaintiff assert his own legal rights and interests and not those of third parties, and (2) the plaintiff's complaint falls within the "zone of interests" protected by the statute in question.

St. Lukes, 982 F. Supp. At 1264 (internal citations and quotations omitted). Plaintiffs bring their suit under 42 U.S.C. § 1983. A statute creates rights enforceable under § 1983 when:

> (1) the statute was intended to benefit the plaintiffs; (2) the statute imposes a binding obligation on the government unit rather than merely expressing a congressional preference for a certain kind of conduct, and (3) the interest asserted by the plaintiff is not so vague or amorphous that it is beyond the competence of the judiciary to enforce.

Legal Services of Northern California, Inc. v Arnett, 114 F. 3d 135, 138 (9th Cir. 1997), citing *Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498, 509 (1990)

Part (1) of the Wilder test is simply another way of restating the prudential standing requirement. In conducting the inquiry, the court must examine "whether particular statutory provisions create specific enforceable rights, rather than considering the statute on a more general level." *Legal Services*, 114 F. 3d at 138, citing *Blessing v. Freestone*, 520 U.S. 329 341-45 (1997).

Plaintiffs AAP and AAPD – which are both associations of medical services providers – allege in the complaint, without elaboration, that Michigan's alleged failure to meet its EPSDT obligations has "imposed otherwise unnecessary expenditures" of their organizational resources. In briefing, plaintiffs claim that AAP and AAPD have

> representative standing to sue defendants for injury resulting from defendants' failure to comply with 42 U.S.C. § 1396a(a)(30)(A), which requires that states ensure that payments under the state medical assistance plan are "sufficient to enlist enough providers so that care and services are available under the plan as least to the extent that such care and services are

> available to the general population in the geographic area."

(*See* Pl. Resp. Br. At 2.) Plaintiffs are incorrect.

Section 1396(a)(30)(A) by its terms is clearly intended to ensure that Medicaid recipients have available to them a level of medical care commensurate with that available to the public at-large in a given geographical area. It is Medicaid recipients, and not providers, who are the intended beneficiaries of this statutory section. As the Second Circuit recently explained in discussing another subsection of § 1396a(a):

> . . . although enforcement of the minimum services requirement ordinarily will benefit certain medical providers such as plaintiffs [providers of portable X-ray services], any such benefit is incidental, because the provision was meant to benefit Medicaid recipients, not those providers.
>
> • • •
>
> [Even if] plaintiffs can demonstrate [] a violation of the Medicaid Act's minimum services provision, [the statutory section requiring X-ray services], which was only intended to benefit Medicaid recipients, and thus cannot be enforced under § 1983 by medical providers such as plaintiffs.

K & A Radiological Technology Services, Inc. v. Commissioner of the Dept. of Health, 189 F.3d 273, 280-81 (1999). Indeed, the section upon which plaintiffs rely specifically requires the state to "safeguard against unnecessary utilization" of Medicaid-subsidized health care services. See

42 U.S.C. § 1396a(a)(30)(A). Such a requirement limiting the utilization of medical services indicates that the economic well-being of service providers is hardly within the contemplation of the statutory section.

It is undoubtedly true that many courts have "found services providers to be among the intended beneficiaries of statutes which establish reimbursement rates." Legal Services, 114 F.3d at 138. And plaintiffs' brief casts their case in precisely those terms:

> . . . in their complaint plaintiffs allege that they have suffered injury as a result of defendants' failure to fulfill their reimbursement obligations under § 1396a(a)(30)(A). *See* Complaint ¶¶ 15-16, 32, 74-76. Accordingly, both the AAP and the AAPD have pled injury sufficient to confer standing.

(Pl, Resp. Br. at 3). In fact, plaintiffs' complaint alleges no such thing. The cited paragraphs discuss only the state's reimbursement obligations in the context of describing the operation of the state's Medicaid program. Nowhere is there any charge that the state has failed to properly reimburse a providers, or that it has improperly set the rates for such reimbursement. Instead, the cited paragraphs are simply part of the plaintiffs' allegations that the state has failed to provide services required by the federal government to their intended Medicaid beneficiaries. As plaintiffs themselves make abundantly clear in their detailed complaint, this case is about service provision, not service provider reimbursement. Because AAP and AAPD are not the intended beneficiaries of § 1396a(a)(30)(A), they lack standing to bring this suit. *Cf. Legal Services*, 114 F. 3d at 138-39 (provider of legal services that failed to receive grant to provide such services lacked standing to bring suit even if state was failing to meet its legal

obligation to provide a sufficient level of such services because the requirement was not intended to benefit service providers).

C. The Remaining Organizational Plaintiffs

Organizational plaintiffs FOM and Westside Mothers remain. These two organizational plaintiffs have facially pled that at least some of the organizations' respective members have standing to sue in their own right for the EPSDT service allegedly unlawfully withheld.[6] Plaintiffs have also pled (but only implicitly, in the case of Westside Mothers) that the organizations have among their several pruposes the protection of low-income medical services such as the EPSDT services at issue in this suit. Finally, there is no indication – for pruposes of this motion – that either the claims asserted or the relief requested require the actual participation of FOM and Westside Mother's individual members. Accordingly, without ruling on any other standing issues, the court finds that FOM and Westside Mothers have met the *Hunt* factors for associational standing at the pleading stage, insofar as their individual members may have standing to bring this suit.

III. Conclusion

For the foregoing reasons, IT IS ORDERED that "Defendants' Motion for Judgement on the Pleadings Against Organizational Plaintiffs" is GRANTED IN PART as to plaintiffs Michigan Chapter of the American Academy of Pediatrics, Michigan Chapter of the American Academy of Pediatric Dentists, Michigan League for Human Services, and Michigan Welfare Rights Organization, who are DISMISSED WITH PREJUDICE.

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[6] The unexplained assertions by both groups of injury through "expenditures of organizational resources" are puzzling, but are also irrelevant, as there appears to be sufficient injury alleged against their individual members.

IT IS FURTHER ORDERED that "Defendants' Motion for Judgement on the Pleadings Against Organizational Plaintiffs" is DENIED IN PART with respect to plaintiffs Families on the Move and Westside Mothers.

s/ Robert H. Cleland
ROBERT H. CLELAND
UNITED STATES DISTRICT JUDGE

December 28, 1999

PURSUANT TO RULE 77'D, FED. R. CIV. P. COPIES MAILED TO ATTORNEYS FOR ALL PARTIES ON 12/28, 1999.
s/Lisa Teels
DEPUTY COURT CLERK

US Const, Art I, § 8, cl 1

The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the Common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States.

US Const, Art III, § 2, cl 1

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority, --to all Cases affecting Ambassadors, other public Ministers and Consuls; --to all Cases of admiralty and maritime Jurisdiction; -- to Controversies to which the United States shall be a Party; --to Controversies between two or more States; --between a State and Citizens of another State; -- between citizens of different States, --between citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

US Const, Art VI, § 2

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof, and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

US Const, 11th Amendment

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

42 USC § 1396

§ 1396. Appropriations

For the purpose of enabling each State, as far as practicable under the conditions in such State, to furnish (1) medical assistance on behalf of families with dependent children and of aged, blind, or disabled individuals, whose income and resources are insufficient to meet the costs of necessary medical services, and (2) rehabilitation and other services to help such families and individuals attain or retain capability for independence or self-care, there is hereby authorized to be appropriated for each fiscal year a sum sufficient to carry out the purposes of this title [*42 USCS § § 1396* et seq.]. The sums made available under this section shall be used for making payments to States which have submitted, and had approved by the Secretary, State plans for medical assistance.

42 USC §§ 1396a(a)(3), 1396a(a)(43)

§ 1396a. State plans for medical assistance

(a) Contents. A State plan for medical assistance must –

***

(3) provide for granting an opportunity for a fair hearing before the State agency to any individual whose claim for medical assistance under the plan is denied or is not acted upon with reasonable promptness;

***

(43) provide for--

(A) informing all persons in the State who are under the age of 21 and who have been determined to be eligible for medical assistance including services described in section 1905(r) [*42 USCS § 1396d*(r)], of the availability of early and periodic screening, diagnostic, and treatment services as described in section 1905(r) [*42 USCS § 1396d*(r)] and the need for age-appropriate immunizations against vaccine-preventable diseases,

(B) providing or arranging for the provision of such screening services in all cases where they are requested,

(C) arranging for (directly or through referral to appropriate agencies, organizations, or individuals) corrective treatment the need for which is disclosed by such child health screening services, and

(D) reporting to the Secretary (in a uniform form and manner established by the Secretary, by age group and by basis of eligibility for medical assistance, and by not later than April 1 after the end of each fiscal year, beginning with fiscal year

1990) the following information relating to early and periodic screening, diagnostic, and treatment services provided under the plan during each fiscal year:

(i) the number of children provided child health screening services,

(ii) the number of children referred for corrective treatment (the need for which is disclosed by such child health screening services),

(iii) the number of children receiving dental services, and

(iv) the State's results in attaining the participation goals set for the State under section 1905(r) [*42 USCS § 1396d*(r)];

42 USC § 1396b(m)(5)(A)

§ 1396b. Payment to States

(m) "Health maintenance organization" defined; duties and functions of Secretary; payments to States; provisional determination of status by State.

***

(5) (A) If the Secretary determines that an entity with a contract under this subsection--

(i) fails substantially to provide medically necessary items and services that are required (under law or under the contract) to be provided to an individual covered under the contract, if the failure has adversely affected (or has substantial likelihood of adversely affecting) the individual;

(ii) imposes premiums on individuals enrolled under this subsection in excess of the premiums permitted under this title [*42 USCS § § 1396* et seq.];

(iii) acts to discriminate among individuals in violation of the provision of paragraph (2)(A)(v), including expulsion or refusal to re-enroll an individual or engaging in any practice that would reasonably be expected to have the effect of denying or discouraging enrollment (except as permitted by this subsection) by eligible individuals with the organization whose medical condition or history indicates a need for substantial future medical services;

(iv) misrepresents or falsifies information that is furnished--

(I) to the Secretary or the State under this subsection, or

(II) to an individual or to any other entity under this subsection,[;] or

(v) fails to comply with the requirements of section 1876(i)(8) [*42 USCS § 1395mm*(i)(8)], the Secretary may

provide, in addition to any other remedies available under law, for any of the remedies described in subparagraph (B).

42 USC § 1396c

§ 1396c. Operation of State plans

If the Secretary, after reasonable notice and opportunity for hearing to the State agency administering or supervising the administration of the State plan approved under this title [*42 USCS § § 1396* et seq.], finds--

(1) that the plan has been so changed that it no longer complies with the provisions of section 1902 [*42 USCS § 1396a]*; or

(2) that in the administration of the plan there is a failure to comply substantially with any such provision;

the Secretary shall notify such State agency that further payments will not be made to the State (or, in his discretion, that payments will be limited to categories under or parts of the State plan not affected by such failure), until the Secretary is satisfied that there will no longer be any such failure to comply. Until he is so satisfied he shall make no further payments to such State (or shall limit payments to categories under or parts of the State plan not affected by such failure).

42 USC § 1396d(r)

§ 1396d. Definitions

For purposes of this title [*42 USCS § § 1396* et seq.]—

***

(r) Early and periodic screening, diagnostic, and treatment services. The term "early and periodic screening, diagnostic, and treatment services" means the following items and services:

(1) Screening services--

(A) which are provided--

(i) at intervals which meet reasonable standards of medical and dental practice, as determined by the State after consultation with recognized medical and dental organizations involved in child health care and, with respect to immunizations under subparagraph (B)(iii), in accordance with the schedule referred to in section 1928(c)(2)(B)(i) [*42 USCS § 1396s*(c)(2)(B)(i)] for pediatric vaccines, and

(ii) at such other intervals, indicated as medically necessary, to determine the existence of certain physical or mental illnesses or conditions; and

(B) which shall at a minimum include--

(i) a comprehensive health and developmental history (including assessment of both physical and mental health development),

(ii) a comprehensive unclothed physical exam,

(iii) appropriate immunizations (according to the schedule referred to in section 1928(c)(2)(B)(i) [*42 USCS § 1396s*(c)(2)(B)(i)] for pediatric vaccines) according to age and health history,

(iv) laboratory tests (including lead blood level assessment appropriate for age and risk factors), and

(v) health education (including anticipatory guidance).

(2) Vision services--

(A) which are provided--

(i) at intervals which meet reasonable standards of medical practice, as determined by the State after consultation with recognized medical organizations involved in child health care, and

(ii) at such other intervals, indicated as medically necessary, to determine the existence of a suspected illness or condition; and

(B) which shall at a minimum include diagnosis and treatment for defects in vision, including eyeglasses.

(3) Dental services--

(A) which are provided--

(i) at intervals which meet reasonable standards of dental practice, as determined by the State after consultation with recognized dental organizations involved in child health care, and

(ii) at such other intervals, indicated as medically necessary, to determine the existence of a suspected illness or condition; and

(B) which shall at a minimum include relief of pain and infections, restoration of teeth, and maintenance of dental health.

(4) Hearing services--

(A) which are provided--

(i) at intervals which meet reasonable standards of medical practice, as determined by the State after consultation with recognized medical organizations involved in child health care, and

(ii) at such other intervals, indicated as medically necessary, to determine the existence of a suspected illness or condition; and

(B) which shall at a minimum include diagnosis and treatment for defects in hearing, including hearing aids.

(5) Such other necessary health care, diagnostic services, treatment, and other measures described in section 1905(a)

[subsec. (a) of this section] to correct or ameliorate defects and physical and mental illnesses and conditions discovered by the screening services, whether or not such services are covered under the State plan.

Nothing in this title [*42 USCS § § 1396* et seq.] shall be construed as limiting providers of early and periodic screening, diagnostic, and treatment services to providers who are qualified to provide all of the items and services described in the previous sentence or as preventing a provider that is qualified under the plan to furnish one or more (but not all) of such items or services from being qualified to provide such items and services as part of early and periodic screening, diagnostic, and treatment services. The Secretary shall, not later than July 1, 1990, and every 12 months thereafter, develop and set annual participation goals for each State for participation of individuals who are covered under the State plan under this title [*42 USCS § § 1396* et seq.] in early and periodic screening, diagnostic, and treatment services.

42 USC § 1396u-2(a), (b)(4),(b)(5)

§ 1396u-2. Provisions relating to managed care

(a) State option to use managed care.

(1) Use of medicaid managed care organizations and primary care case managers.

(A) In general. Subject to the succeeding provisions of this section, and notwithstanding paragraph (1), (10)(B), or (23)(A) of section 1902(a) [*42 USCS § 1396a*(a)], a State--

(i) may require an individual who is eligible for medical assistance under the State plan under this title [*42 USCS § § 1396* et seq.] to enroll with a managed care entity as a condition of receiving such assistance (and, with respect to assistance furnished by or under arrangements with such entity, to receive such assistance through the entity), if--

(I) the entity and the contract with the State meet the applicable requirements of this section and section 1903(m) or section 1905(t) [*42 USCS § 1396b*(m) or 1396d(t)], and

(II) the requirements described in the succeeding paragraphs of this subsection are met; and

(ii) may restrict the number of provider agreements with managed care entities under the State plan if such restriction does not substantially impair access to services.

(B) Definition of managed care entity. In this section, the term "managed care entity" means--

(i) a medicaid managed care organization, as defined in section 1903(m)(1)(A) [*42 USCS § 1396b*(m)(1)(A)], that provides or arranges for services for enrollees under a contract pursuant to section 1903(m) [*42 USCS § 1396b*(m)]; and

(ii) a primary care case manager, as defined in section 1905(t)(2) [*42 USCS § 1396d*(t)(2)].

(2) Special rules.

(A) Exemption of certain children with special needs. A State may not require under paragraph (1) the enrollment in a

managed care entity of an individual under 19 years of age who--

(i) is eligible for supplemental security income under title XVI [*42 USCS § § 1381* et seq.];

(ii) is described in section 501(a)(1)(D) [*42 USCS § 701*(a)(1)(D)];

(iii) is described in section 1902(e)(3) [*42 USCS § 1396a*(e)(3)];

(iv) is receiving foster care or adoption assistance under part E of title IV [*42 USCS § § 670* et seq.]; or

(v) is in foster care or otherwise in an out-of-home placement.

(B) Exemption of medicare beneficiaries. A State may not require under paragraph (1) the enrollment in a managed care entity of an individual who is a qualified medicare beneficiary (as defined in section 1905(p)(1) [*42 USCS § 1396d*(p)(1)]) or an individual otherwise eligible for benefits under title XVIII [*42 USCS § § 1395* et seq.].

(C) Indian enrollment. A State may not require under paragraph (1) the enrollment in a managed care entity of an individual who is an Indian (as defined in section 4(c) of the Indian Health Care Improvement Act of 1976 *(25 U.S.C. 1603*(c)) unless the entity is one of the following (and only if such entity is participating under the plan):

(i) The Indian Health Service.

(ii) An Indian health program operated by an Indian tribe or tribal organization pursuant to a contract, grant, cooperative agreement, or compact with the Indian Health Service pursuant to the Indian Self-Determination Act *(25 U.S.C. 450* et seq.).

(iii) An urban Indian health program operated by an urban Indian organization pursuant to a grant or contract with the Indian Health Service pursuant to title V of the Indian Health Care Improvement Act *(25 U.S.C. 1601* et seq.).

(3) Choice of coverage.

(A) In general. A State must permit an individual to choose a managed care entity from not less than two such entities that meet the applicable requirements of this section, and of section

1903(m) or section 1905(t) [*42 USCS § 1396b*(m) or 1396d(t)].

(B) State option. At the option of the State, a State shall be considered to meet the requirements of subparagraph (A) in the case of an individual residing in a rural area, if the State requires the individual to enroll with a managed care entity if such entity--

(i) permits the individual to receive such assistance through not less than two physicians or case managers (to the extent that at least two physicians or case managers are available to provide such assistance in the area), and

(ii) permits the individual to obtain such assistance from any other provider in appropriate circumstances (as established by the State under regulations of the Secretary).

(C) Treatment of certain county-operated health insuring organizations. A State shall be considered to meet the requirement of subparagraph (A) if--

(i) the managed care entity in which the individual is enrolled is a health-insuring organization which--

(I) first became operational prior to January 1, 1986, or

(II) is described in section 9517(c)(3) of the Omnibus Budget Reconciliation Act of 1985 (as added by section 4734(2) of the Omnibus Budget Reconciliation Act of 1990) [*42 USCS § 1396b* note], and

(ii) the individual is given a choice between at least two providers within such entity.

(4) Process for enrollment and termination and change of enrollment. As conditions under paragraph (1)(A)--

(A) In general. The State, enrollment broker (if any), and managed care entity shall permit an individual eligible for medical assistance under the State plan under this title [*42 USCS § § 1396* et seq.] who is enrolled with the entity under this title [*42 USCS § § 1396* et seq.] to terminate (or change) such enrollment--

(i) for cause at any time (consistent with section 1903(m)(2)(A)(vi) [*42 USCS § 1396b*(m)(2)(A)(vi)]), and

(ii) without cause--

(I) during the 90-day period beginning on the date the individual receives notice of such enrollment, and

(II) at least every 12 months thereafter.

(B) Notice of termination rights. The State shall provide for notice to each such individual of the opportunity to terminate (or change) enrollment under such conditions. Such notice shall be provided at least 60 days before each annual enrollment opportunity described in subparagraph (A)(ii)(II).

(C) Enrollment priorities. In carrying out paragraph (1)(A), the State shall establish a method for establishing enrollment priorities in the case of a managed care entity that does not have sufficient capacity to enroll all such individuals seeking enrollment under which individuals already enrolled with the entity are given priority in continuing enrollment with the entity.

(D) Default enrollment process. In carrying out paragraph (1)(A), the State shall establish a default enrollment process--

(i) under which any such individual who does not enroll with a managed care entity during the enrollment period specified by the State shall be enrolled by the State with such an entity which has not been found to be out of substantial compliance with the applicable requirements of this section and of section 1903(m) or section 1905(t) [*42 USCS § 1396b*(m) or 1396d(t)]; and

(ii) that takes into consideration--

(I) maintaining existing provider-individual relationships or relationships with providers that have traditionally served beneficiaries under this title [*42 USCS § § 1396* et seq.]; and

(II) if maintaining such provider relationships is not possible, the equitable distribution of such individuals among qualified managed care entities available to enroll such individuals, consistent with the enrollment capacities of the entities.

(5) Provision of information.

(A) Information in easily understood form. Each State, enrollment broker, or managed care entity shall provide all

enrollment notices and informational and instructional materials relating to such an entity under this title [*42 USCS § § 1396* et seq.] in a manner and form which may be easily understood by enrollees and potential enrollees of the entity who are eligible for medical assistance under the State plan under this title [*42 USCS § § 1396* et seq.].

(B) Information to enrollees and potential enrollees. Each managed care entity that is a medicaid managed care organization shall, upon request, make available to enrollees and potential enrollees in the organization's service area information concerning the following:

(i) Providers. The identity, locations, qualifications, and availability of health care providers that participate with the organization.

(ii) Enrollee rights and responsibilities. The rights and responsibilities of enrollees.

(iii) Grievance and appeal procedures. The procedures available to an enrollee and a health care provider to challenge or appeal the failure of the organization to cover a service.

(iv) Information on covered items and services. All items and services that are available to enrollees under the contract between the State and the organization that are covered either directly or through a method of referral and prior authorization. Each managed care entity that is a primary care case manager shall, upon request, make available to enrollees and potential enrollees in the organization's service area the information described in clause (iii).

(C) Comparative information. A State that requires individuals to enroll with managed care entities under paragraph (1)(A) shall annually (and upon request) provide, directly or through the managed care entity, to such individuals a list identifying the managed care entities that are (or will be) available and information (presented in a comparative, chart-like form) relating to the following for each such entity offered:

(i) Benefits and cost-sharing. The benefits covered and cost-sharing imposed by the entity.

(ii) Service area. The service area of the entity.

(iii) Quality and performance. To the extent available, quality and performance indicators for the benefits under the entity.

(D) Information on benefits not covered under managed care arrangement. A State, directly or through managed care entities, shall, on or before an individual enrolls with such an entity under this title [*42 USCS § § 1396* et seq.], inform the enrollee in a written and prominent manner of any benefits to which the enrollee may be entitled to under this title [*42 USCS § § 1396* et seq.] but which are not made available to the enrollee through the entity. Such information shall include information on where and how such enrollees may access benefits not made available to the enrollee through the entity.

(b) Beneficiary protections.

***

(4) Grievance procedures. Each medicaid managed care organization shall establish an internal grievance procedure under which an enrollee who is eligible for medical assistance under the State plan under this title [*42 USCS § § 1396* et seq.], or a provider on behalf of such an enrollee, may challenge the denial of coverage of or payment for such assistance.

(5) Demonstration of adequate capacity and services. Each medicaid managed care organization shall provide the State and the Secretary with adequate assurances (in a time and manner determined by the Secretary) that the organization, with respect to a service area, has the capacity to serve the expected enrollment in such service area, including assurances that the organization--

(A) offers an appropriate range of services and access to preventive and primary care services for the population expected to be enrolled in such service area, and

(B) maintains a sufficient number, mix, and geographic distribution of providers of services.

42 USC § 1983

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 CFR 431.220 – 431.250

§ 431.220 When a hearing is required.

(a) The State agency must grant an opportunity for a hearing to the following:

(1) Any applicant who requests it because his claim for services is denied or is not acted upon with reasonable promptness.

(2) Any recipient who requests it because he or she believes the agency has taken an action erroneously.

(3) Any resident who requests it because he or she believes a skilled nursing facility or nursing facility has erroneously determined that he or she must be transferred or discharged.

(4) Any individual who requests it because he or she believes the State has made an erroneous determination with regard to the preadmission and annual resident review requirements of section 1919(e)(7) of the Act.

(5) Any MCO or PIHP enrollee who is entitled to a hearing under subpart F of part 438 of this chapter.

(6) Any PAHP enrollee who has an action as stated in this subpart.

(b) The agency need not grant a hearing if the sole issue is a Federal or State law requiring an automatic change adversely affecting some or all recipients.

§ 431.221 Request for hearing.

(a) The agency may require that a request for a hearing be in writing.

(b) The agency may not limit or interfere with the applicant's or recipient's freedom to make a request for a hearing.

(c) The agency may assist the applicant or recipient in submitting and processing his request.

(d) The agency must allow the applicant or recipient a reasonable time, not to exceed 90 days from the date that notice of action is mailed, to request a hearings.

§ 431.222 Group hearings.

The agency--

(a) May respond to a series of individual requests for hearing by conducting a single group hearing;

(b) May consolidate hearings only in cases in which the sole issue involved is one of Federal or State law or policy;

(c) Must follow the policies of this subpart and its own policies governing hearings in all group hearings; and

(d) Must permit each person to present his own case or be represented by his authorized representative.

§ 431.223 Denial or dismissal of request for a hearing.

The agency may deny or dismiss a request for a hearing if--

(a) The applicant or recipient withdraws the request in writing; or

(b) The applicant or recipient fails to appear at a scheduled hearing without good cause.

§ 431.230 Maintaining services.

(a) If the agency mails the 10-day or 5-day notice as required under § 431.211 or § 431.214 of this subpart, and the recipient requests a hearing before the date of action, the agency may not terminate or reduce services until a decision is rendered after the hearing unless--

(1) It is determined at the hearing that the sole issue is one of Federal or State law or policy; and

(2) The agency promptly informs the recipient in writing that services are to be terminated or reduced pending the hearing decision.

(b) If the agency's action is sustained by the hearing decision, the agency may institute recovery procedures against the applicant or recipient to recoup the cost of any services furnished the recipient, to the extent they were furnished solely by reason of this section.

§ 431.231 Reinstatement of services.

(a) The agency may reinstate services if a recipient requests a hearing not more than 10 days after the date of action.

(b) The reinstated services must continue until a hearing decision unless, at the hearing, it is determined that the sole issue is one of Federal or State law or policy.

(c) The agency must reinstate and continue services until a decision is rendered after a hearing if--

(1) Action is taken without the advance notice required under § 431.211 or § 431.214 of this subpart;

(2) The recipient requests a hearing within 10 days of the mailing of the notice of action; and

(3) The agency determines that the action resulted from other than the application of Federal or State law or policy.

(d) If a recipient's whereabouts are unknown, as indicated by the return of unforwardable agency mail directed to him, any discontinued services must be reinstated if his whereabouts become known during the time he is eligible for services.

§ 431.232 Adverse decision of local evidentiary hearing.

If the decision of a local evidentiary hearing is adverse to the applicant or recipient, the agency must--

(a) Inform the applicant or recipient of the decision;

(b) Inform the applicant or recipient that he has the right to appeal the decision to the State agency, in writing, within 15 days of the mailing of the notice of the adverse decision;

(c) Inform the applicant or recipient of his right to request that his appeal be a de novo hearing; and

(d) Discontinue services after the adverse decision.

§ 431.233 State agency hearing after adverse decision of local evidentiary hearing.

(a) Unless the applicant or recipient specifically requests a de novo hearing, the State agency hearing may consist of a review by the agency hearing officer of the record of the local evidentiary hearing to determine whether the decision of the local hearing officer was supported by substantial evidence in the record.

(b) A person who participates in the local decision being appealed may not participate in the State agency hearing decision.

§ 431.240 Conducting the hearing.

(a) All hearings must be conducted--

(1) At a reasonable time, date, and place;

(2) Only after adequate written notice of the hearing; and

(3) By one or more impartial officials or other individuals who have not been directly involved in the initial determination of the action in question.

(b) If the hearing involves medical issues such as those concerning a diagnosis, an examining physician's report, or a medical review team's decision, and if the hearing officer considers it necessary to have a medical assessment other than that of the individual involved in making the original decision, such a medical assessment must be obtained at agency expense and made part of the record.

§ 431.241 Matters to be considered at the hearing.

The hearing must cover--

(a) Agency action or failure to act with reasonable promptness on a claim for services, including both initial and subsequent decisions regarding eligibility;

(b) Agency decisions regarding changes in the type or amount of services;

(c) A decision by a skilled nursing facility or nursing facility to transfer or discharge a resident; and

(d) A State determination with regard to the preadmission screening and annual resident review requirements of section 1919(e)(7) of the Act.

§ 431.242 Procedural rights of the applicant or recipient.

The applicant or recipient, or his representative, must be given an opportunity to--

(a) Examine at a reasonable time before the date of the hearing and during the hearing:

(1) The content of the applicant's or recipient's case file; and

(2) All documents and records to be used by the State or local agency or the skilled nursing facility or nursing facility at the hearing;

(b) Bring witnesses;

(c) Establish all pertinent facts and circumstances;

(d) Present an argument without undue interference; and

(e) Question or refute any testimony or evidence, including opportunity to confront and cross-examine adverse witnesses.

§ 431.243 Parties in cases involving an eligibility determination.

If the hearing involves an issue of eligibility and the Medicaid agency is not responsible for eligibility determinations, the agency that is responsible for determining eligibility must participate in the hearing.

§ 431.244 Hearing decisions.

(a) Hearing recommendations or decisions must be based exclusively on evidence introduced at the hearing.

(b) The record must consist only of --

(1) The transcript or recording of testimony and exhibits, or an official report containing the substance of what happened at the hearing;

(2) All papers and requests filed in the proceeding; and

(3) The recommendation or decision of the hearing officer.

(c) The applicant or recipient must have access to the record at a convenient place and time.

(d) In any evidentiary hearing, the decision must be a written one that --

(1) Summarizes the facts; and

(2) Identifies the regulations supporting the decision.

(e) In a de novo hearing, the decision must --

(1) Specify the reasons for the decision; and

(2) Identify the supporting evidence and regulations.

(f) The agency must take final administrative action as follows:

(1) Ordinarily, within 90 days from the earlier of the following:

(i) The date the enrollee filed an MCO or PIHP appeal, not including the number of days the enrollee took to subsequently file for a State fair hearing; or

(ii) If permitted by the State, the date the enrollee filed for direct access to a State fair hearing.

(2) As expeditiously as the enrollee's health condition requires, but no later than 3 working days after the agency receives, from the MCO or PIHP, the case file and information for any appeal of a denial of a service that, as indicated by the MCO or PIHP --

(i) Meets the criteria for expedited resolution as set forth in 438.410(a) of this chapter, but was not resolved within the timeframe for expedited resolution; or

(ii) Was resolved within the timeframe for expedited resolution, but reached a decision wholly or partially adverse to the enrollee.

(3) If the State agency permits direct access to a State fair hearing, as expeditiously as the enrollee's health condition requires, but no later than 3 working days after the agency receives, directly from an MCO or PIHP enrollee, a fair hearing request on a decision to deny a service that it determines meets the criteria for expedited resolution, as set forth in 438.410(a) of this chapter.

(g) The public must have access to all agency hearing decisions, subject to the requirements of subpart F of this part for safeguarding of information.

§ 431.245 Notifying the applicant or recipient of a State agency decision.

The agency must notify the applicant or recipient in writing of--

(a) The decision; and

(b) His right to request a State agency hearing or seek judicial review, to the extent that either is available to him.

§ 431.246 Corrective action.

The agency must promptly make corrective payments, retroactive to the date an incorrect action was taken, and, if appropriate, provide for admission or readmission of an individual to a facility if--

(a) The hearing decision is favorable to the applicant or recipient; or

(b) The agency decides in the applicant's or recipient's favor before the hearing.

§ 431.250 Federal financial participation.

FFP is available in expenditures for--

(a) Payments for services continued pending a hearing decision;

(b) Payments made--

(1) To carry out hearing decisions; and

(2) For services provided within the scope of the Federal Medicaid program and made under a court order.

(c) Payments made to take corrective action prior to a hearing;

(d) Payments made to extend the benefit of a hearing decision or court order to individuals in the same situation as those directly affected by the decision or order;

(e) Retroactive payments under paragraphs (b), (c), and (d) of this section in accordance with applicable Federal policies on corrective payments; and

(f) Administrative costs incurred by the agency for--

(1) Transportation for the applicant or recipient, his representative, and witnesses to and from the hearing;

(2) Meeting other expenses of the applicant or recipient in connection with the hearing;

(3) Carrying out the hearing procedures, including expenses of obtaining the additional medical assessment specified in § 431.240 of this subpart; and

(4) Hearing procedures for Medicaid and non-Medicaid individuals appealing transfers, discharges and determinations of preadmission screening and annual resident reviews under part 483, subparts C and E of this chapter.

42 CFR 441.62

§ 441.62 Transportation and scheduling assistance.

The agency must offer to the family or recipient, and provide if the recipient requests--

(a) Necessary assistance with transportation as required under § 431.53 of this chapter; and

(b) Necessary assistance with scheduling appointments for services.

MCL § 400.37

§ 400.37. Investigation and report to state department, recommendation; hearing upon disallowance or dissatisfaction; appeal to circuit court, time bond, costs.

Sec. 37. Whenever an application is made for assistance, the county department of social welfare shall make a thorough investigation and report to the state department in the manner prescribed by it, giving its recommendation of the amount of assistance, if any, to be allowed. If the application be disallowed, or if the applicant is dissatisfied with the amount of assistance he is receiving, or is to receive, he may demand, in writing, a hearing of his case, as provided for in section 9 or section 65. The applicant or recipient may appeal to the circuit court of the county in which he resides, which court shall have power to review questions of law involved in any final decision or determination of the state department. Said petition shall be filed within 30 days of the receipt of such decision or determination. The petitioner shall not be required to furnish any bond and costs shall not be taxed against him. If the court shall decide in favor of the petitioner, assistance shall be paid from the first day of the month following the date of the application therefor or of the date of the original application for the relief in question.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF M1CHIGAN

Westside Mothers, Michigan Welfare Rights Organization, Michigan League for Human Services Inc. Families on the Move Inc. Michigan Chapter, American Academy of Pediatrics Michigan Chapter, American Academy of Pediatric Dentists, and M. B., by her next friend, Tricia G., B. K., by her next friend Lois Ann K., D. J., by her next friend. Tangela W., Dn. J., by her next friend, Tangela W., Dm. J., by his next friend, Tangela W., K. K., by her next friend Vicki K., K. T., by her next friend Veda T., J. T., by his next friend Veda T.,

On Behalf of Themselves and all Others Similarly Situated,	:	CIVIL ACTION
Plaintiffs,	:	
v.	:	No. 99-73442
James K. Haveman, Jr., In His Official Capacity as Director of the State of Michigan Department of Community Health, Lewis Cass Building, 6th Floor 320 Walnut Street, Lansing MI 48913; Robert Smedes, In His Official Capacity as Deputy Director of the Medical Services Administration P.O. Box 30479, 400 South Pine, Lansing, Ml 48909	:	Robert H. Cleland Magistrate Judge Morg CLASS ACTION
Defendants.	:	
_____	/	

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CLASS ACTION COMPLAINT

I. INTRODUCTION

1. This is a civil rights class action against Michigan state officials arising out of their failure to provide children in Michigan, who are eligible for Medical Assistance, with essential medical, dental, and mental health services as required by federal law. This case is brought on behalf of the more than 800,000 children throughout Michigan who depend on the Medical Assistance program for essential medical, dental, developmental and mental health services, including Early and Periodic Screening, Diagnosis, and Treatment Services ("EPSDT services"). The named Plaintiffs, on behalf of these children, seek injunctive relief and appointment of a Special Master to stop the systemic violation of federal laws currently taking place in Michigan, which is causing these children to be deprived of essential medical, dental, and mental health services. The unlawful deprivation of medically necessary care results in the needless infliction of pain, the endangerment of young lives, the disruption of learning , development and growth and the stunting of children's chances to achieve their full potential.

2. Specifically, this action seeks to enjoin state officials from:

(a) Depriving children of basic healthcare services in violation of Title XIX of the Social Security Act, 42 U.S.C. §§ 1396 et seq. (hereinafter referred to as the "Medicaid Act") and implementing federal regulations and guidelines;

(b) Implementing a Medical Assistance "managed care" program that fails to ensure that children who are eligible for Medical Assistance receive the EPSDT services that they are entitled to receive under federal law; and

(c) Failing to inform effectively children who are eligible for Medical Assistance and their families of the availability of EPSDT services, the benefits of preventive care, and the availability of transportation and scheduling assistance needed to obtain EPSDT services, in violation of the Medicaid Act and implementing federal regulations and guidelines.

II. JURISDICTION AND VENUE

3. Plaintiffs bring this action to redress the deprivation of rights secured them under the Medicaid Act, which is enforceable under 42 U.S.C. § 1983.

4. This Court has subject matter jurisdiction under 28 U.S.C. § 1331, which confers on the federal district courts original jurisdiction over all civil suits arising under the Constitution and laws of the United States, and 28 U.S.C. § 1343(a)(3) and (4), which confers on the federal district courts original jurisdiction over all claims asserted under 42 U.S.C. § 1983 to redress any deprivation, under color of state law, of rights, privileges, and immunities guaranteed by the Constitution of the United States or the acts of Congress.

5. Plaintiffs' request for declaratory and injunctive relief, and for other appropriate equitable relief, is authorized by 28 U.S.C. § 2201-02, 42 U.S.C. § 1983, and Fed. R. Civ. P. 57 and 65.

6. Venue is proper in the Eastern District of Michigan under 28 U.S.C. § 1391(b).

III PARTIES

A. Plaintiffs

7. Plaintiff M. B.[7] is four years old and is eligible for Medical Assistance. M. B. lives with her mother, Tricia G., in Pellston, Michigan. M. B. has never been tested for lead and has never had her hearing tested.

M. B. has a medical problem that causes her to run very high fevers, some as high as 106 degrees. M. B. has not received proper treatment for this problem and her mother must often take her to the emergency room to control these fevers. In addition, M. B. has skin disorders that have not been properly treated. For example, M. B. was diagnosed by her doctor as having dry skin and the physician recommended not bathing for a one-week period. The condition worsened and M. B. was in pain, so her mother took her to the emergency room. At the hospital, M. B. was diagnosed with exema and a staph infection in her hands. M. B. also has severe allergies that have not been treated.

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[7] Plaintiffs are identified in this Complaint by use of a pseudonym in order to avoid the stigma and ridicule associated with various physical and mental illnesses. Declarations with the full names of the Plaintiffs will be filed with the Court under seal.

M.B. has a medical condition that causes her body to produce excess acid, which disintegrates the enamel on her teeth. This condition has caused M. B. severe dental pain. M. B. has already had two front teeth pulled because the nerves were exposed, and she must now have two other front teeth pulled for the same reason. To receive dental care, M. B.'s mother must take her to a dentist whose office is located approximately two hours from M. B.'s house. This dentist is a traveling pediatric dentist who only sees patients one day per month at this location. Thus, making appointments for M. B. can be very difficult and she has had to wait up to four months to see the dentist.

Finally, M. B. recently has been exhibiting bizarre behavior. She often sees things that aren't there and becomes extremely frightened. At this point, M. B. often refuses to go outside. Because there is a history of mental illness in M. B.'s family (her father suffered from bipolar disorder and manic depression), M. B. is at increased risk for mental illness and should be evaluated. Tricia G. has not been able, however, to obtain a psychological evaluation for her daughter. M. B. appears in this action by her next friend and mother, Tricia G.

8. Plaintiff B. K. is four years old and lives with her mother and grandmother in Detroit, Michigan. B. K. is eligible for Medical Assistance in the State of Michigan. B. K. has not received periodic comprehensive screening examinations or treatment services, and has not received appropriate dental examinations or referrals for dental treatment. B. K. has severe developmental delays and still is not toilet trained. B. K.'s developmental problems were not diagnosed until she was three years of age because she was never properly screened or tested for developmental problems until that late age. B. K. appears in this action by her next friend and mother, Lois Ann K.

9. Plaintiff D. J. is eight years old and is eligible for Medical Assistance in Michigan. D. J. lives in Detroit, Michigan, with her mother, Tangela W. She suffers from spina bifida occulta and has recently been diagnosed as having an abnormally small head. She is currently in second grade and is demonstrating significant learning disabilities. In addition, she is in chronic pain. On two occasions, D. J.'s blood lead level was abnormally high. D. J. was never treated for these high blood levels or provided case-management services to get assistance in identifying the lead source, in abating it, and in getting enrolled in an Early Intervention program to ameliorate and overcome cognitive and developmental deficits often caused by high lead levels. D. J. appears in this action by her next friend and mother, Tangela W.

10. Plaintiff Dn. J. is six years old, is eligible for Medical Assistance, and lives in Detroit, Michigan, with her mother, Tangela W. She suffers from seizures which began before she was a year old. She is also demonstrating severe learning disabilities in school. On information and belief she has not received an EPSDT screen, and has not yet been tested for developmental disabilities. A brain scan is scheduled for March 23, 1999. As a toddler, Dn. J. ingested paint chips in the family's older home, but she has not yet been tested for blood lead levels nor has she been provided case-management services to get assistance in identifying the lead source, in abating it, and in getting enrolled in an Early Intervention program to ameliorate and overcome cognitive and developmental deficits often caused by high lead levels. Dn. J. appears in this action by her next friend and mother, Tangela W.

11. Plaintiff Dm. J. is five years old and is eligible for Medical Assistance. Dm. J. lives in Detroit, Michigan, with his mother, Tangela W. Because of apparent problems related to his failure to respond to oral communication, he requires testing for hearing loss, seizures and developmental

disabilities. He attends kindergarten but is demonstrating significant learning disabilities. Although testing is scheduled to determine whether he has any hearing problems or seizure disorders, no such testing has been scheduled to determine whether he has any developmental disabilities. Dm. J. appears in this action by her next friend and mother, Tangela W.

12. Plaintiff K. K. is eight years old and is eligible for Medical Assistance in Michigan. She lives in Rogers City, Michigan, with her mother, Vicky K. For K. K. to see a pediatric dentist who will accept Medical Assistance, her mother must take her to Petoskey, Michigan. Petoskey is approximately a 1 ½ hour drive from the K's home in Rogers City. Furthermore, the dentist who treats K. K. is a traveling pediatric dentist who is only in Petoskey one day per month. Therefore, scheduling an appointment with this dentist can be very difficult, and K. K. often must wait several months before she is able to see the dentist. K. K. appears in this action by her next friend and mother, Vicky K.

13. Plaintiff K. T. is 15-years old and resides with her adoptive mother, Veda T., in Detroit, Michigan, where she has resided since 1985. K. T. has been enrolled in Medical Assistance all of her life. She has been enrolled in Health Alliance Plan for the last 18 months. K. T. was sexually abused while living with her biological family and was diagnosed as suffering from Post Traumatic Stress Disorder ("PTSD"). From 1985 to 1997, twelve years, K.T. did not receive mental health services for her disorder. She began receiving mental health services two years ago after persistent efforts by her adoptive mother finally resulted in the family being enrolled in "Wraparound Services" provided by the Family Independence Agency. These services were previously only offered for families of juvenile delinquents.

14. Plaintiff J. T. is a 11 years old and resides with his adoptive mother, Veda T. in Detroit, Michigan, where he has resided since 1993. J. T. has been enrolled in Medical Assistance for his entire life and is currently enrolled in Omni Care. J. T. suffered a closed head injury in 1993 for which he requires ongoing care, including a consult with a neurologist. He has also been diagnosed with Attention Deficit Activity Disorder. J.T. was deprived of medical treatments, including a follow up consultation with a neurologist and day treatment services at Hawthorn Center, the state hospital for children with emotional disorders, for his Attention Deficit Activity Disorder for four years. In 1997, his adoptive mother finally succeeded in enrolling him in "Wraparound Servicew" with the Family Independence Agency where he was provided with treatment. Despite lifelong receipt of medicain, there are no available medical records or a medical history for the boy.

15. Plaintiff Michigan Chapter, American Academy of Pediatrics ("AAP") is a not-for-profit organization with more than 1500 member pediatricians in Michigan. The mission of the AAP is to attain "optimal physical, mental, and social health for all infants, children, adolescents and young adults." The AAP dedicates its resources and efforts to protecting the medical needs of children. In particular, the AAP focuses on promoting policies that increase access to health care for low-income children. Thus, the AAP seeks to assure that children who are Medical Assistance beneficiaries receive EPSDT services. The unlawful acts and omissions of defendants have imposed otherwise unnecessary expenditures of organizational resources upon the AAP.

16. Plaintiff Michigan Chapter, American Academy of Pediatric Dentists ("AAPD") is a not-for-profit organization with more than 100 member pediatric dentists in Michigan. The mission of the AAPD is to improve and maintain the oral health of infants, children, adolescents, and persons with special needs. The AAPD is dedicated to promoting policies

that increase access to oral health care for low-income children. Thus, the AAPD seeks to assure that children who are Medical Assistance beneficiaries receive periodic and comprehensive dental examinations and treatment under EPSDT. The unlawful acts and omissions of defendants have imposed otherwise unnecessary expenditures of organizational resources upon the AAPD.

17. Plaintiff, Michigan League for Human Services, ("MLHS") is a statewide citizens organization founded in 1912 dedicated to education, research and advocacy for the benefit of low-income and other vulnerable citizens in the State of Michigan. The League is comprised of over 1300 individuals and organizations located across Michigan. It has served the human service community in Michigan for over 85 years. Its broad organizational purposes are: to identify and help solve basic health and social welfare problems in Michigan and to advocate for the provision of cost effective and coordinated preventive and remedial human services by public and private services sectors which are adequate to meet the need. MLHS uses general education, research, planning, coalition building and advocacy programs to accomplish its specific objectives of developing a broad understanding of the State's social welfare and health needs and generating public and private support and consensus for needed service programs. The League provides critical leadership in framing the key issues that should be examined as Michigan proceeds with further changes to its welfare and health care systems. At the same time, the League has expanded its emphasis on the well-being of children. The League annually publishes a report on the relative well-being of Michigan's children called "Kids Count in Michigan." Among other data that is widely quoted and cited to promote policies that enhance child well being , the report also examines EPSDT compliance rates. A priority for the League's advocacy work is identifying ways to meet the unmet health care needs of broad segments of the population

18. Plaintiff, Families On the Move, Inc. ("FOM") is a Michigan nonprofit organization in the process of obtaining 501c(3) status. FOM is a membership organization comprised of foster parents, adoptive parents, and biological parents of special needs children. The organization is based in Wayne County, Michigan, with members throughout the State. The group was organized to provide support and information, and to advocate on behalf of families with children with special needs. Well over half of the members are foster families in the process of adopting their foster children. These children are special needs children who suffer from a variety of illnesses and disabilities and who require ongoing medical assistance for their conditions. All of the foster care and adoptive children are eligible for, or are receiving, Medical Assistance. An overwhelming number of these children have a history of grossly inadequate medical care. Foster care parents are required by law to ensure that their foster children are immunized. The foster care children have multiple special needs and are frequently from abusive homes. Foster care parents are expected to ensure adequate health care for their children. These parents face obstacles, however, including lack of complete records, a history of inadequate health care and defendants' failures to provide the childrens' health care services required by law and to require their provision by managed care organizations. The unlawful acts and omissions of defendants have imposed otherwise unnecessary expenditures of organizational resources upon FOM.

19. Plaintiff Michigan Welfare Rights Organization is a state-wide, unincorporated association of welfare rights organizations comprised of families and children who are enrolled in the Medical Assistance program and who need EPSDT services. The unlawful acts and omissions of defendants have imposed otherwise unnecessary expenditures of organizational resources upon Michigan Welfare Rights Organization.

20. Plaintiff Westside Mothers is a non-profit welfare rights organization which includes more than 600 members living primarily on Detroit's Westside, the majority of whom are mothers and their children enrolled in the Medical Assistance program and who need EPSDT services.

B. **Defendants**

21. Defendant James K. Haveman, Jr., is the Director of the Michigan Department of Community Health (DCH), which has been designated by the Governor of Michigan as the single state Medical Assistance agency. As such, Defendant Haveman has the ultimate, nondelegable duty to assure that Michigan's Medical Assistance program is implemented and administered consistent with the requirements of the Medicaid Act. Defendant Haveman is sued in his official capacity.

22. Defendant Robert Smedes is the Deputy Director of the Medical Services Administration, which is the state Medical Assistance agency. As such, he is responsible for heading the agency that provides healthcare coverage for the Michigan residents who are eligible for Medical Assistance. Defendant Smedes is sued in his official capacity.

IV. CLASS ACTION ALLEGATIONS

23. The named Plaintiffs bring this action on behalf of themselves and all others similarly situated pursuant to Fed. R. Civ. P. 23(a) and (b)(2). Plaintiffs' class consists of children under the age of 21 who are now, or will in the future be, residing in Michigan and who are, or will be, eligible for Medical Assistance's Early and Periodic Screening, Diagnosis, and Treatment Services ("EPSDT Services").

24. The requirements of Fed. R. Civ. P. 23(a) are met in that the class is so numerous that joining all members is impractical. According to official reports of the Michigan Medical Assistance program, more than 780,000 children under age 21 were eligible for Medical Assistance health care services in fiscal year 1997.

25. The named Plaintiffs raise claims based on questions of law and fact that are common to the class. Plaintiffs and the class members rely on Defendants to ensure that they have access to and receive the health care services guaranteed them under federal law. Plaintiffs and the class members are being deprived of these services because of systemic deficiencies in Michigan's Medical Assistance program, for which Defendants are responsible. Questions of fact common to the entire class include whether:

(a) Defendants fail to provide, or to ensure that managed care organizations and providers participating in Medical Assistance provide, appropriate screening, diagnosis, and treatment for children enrolled in Medical Assistance, including but not limited to medical, vision, hearing, dental, and developmental screening and diagnosis at appropriate intervals that meet reasonable standards of medical practice, and the prompt delivery of all needed treatment;

(b) Defendants fail or refuse to develop and implement a coordinated system of care that provides class members with medical, vision, hearing, dental, and developmental screening, diagnosis and treatment, at appropriate intervals that meet reasonable standards of medical care; and

(c) Defendants fail to ensure that families of children enrolled in Medical Assistance are adequately informed of their children's right to receive EPSDT services and of how to obtain such services and that they receive them.

Questions of law common to the entire class include whether Defendants' acts and omissions deprive Plaintiffs of EPSDT services in violation of the Medicaid Act, 42 U.S.C. § 1396a, 1396d(a), 1396d(r), 1396u-2 and regulations and guidelines promulgated pursuant thereto.

26. The named Plaintiffs will fairly and adequately protect the interests of the class. They are represented by attorneys employed by Michigan Legal Services, Dechert Price & Rhoads, the Public Interest Law Center of Philadelphia, and the National Health Law Program. Counsel have experience in complex class action litigation involving health care and civil rights laws. Counsel have the resources, expertise, and experience to prosecute this action.

27. Defendants' acts and omissions have affected and will affect the class generally, thereby making appropriate final injunctive relief and declaratory relief with respect to the class as a whole.

IV. FACTUAL ALLEGATIONS

A. Overview of the Programs and Services at Issue

Title XIX's Requirement for Children's health Care (EPSDT) Services

28. The Medical Assistance title of the Social Security Act provides for medical assistance to individuals who lack the financial means to obtain needed health care on their own. 42 U.S.C. § 1396 et seq. Medical Assistance, also commonly known as "Medicaid," is partially administered by the federal government, under the aegis of the Health Care Financing Administration (HCFA) of the Department of Health and Human Services. Each state can decide whether to participate in the Medical Assistance program, and all states do. The state and federal governments share responsibility for funding Medical Assistance. In Michigan, the federal government pays approximately 56.8 % of all Medical Assistance service costs and the state pays the remaining 43.2 % of the service costs. For designating and operating information systems and for quality assurance, the federal share is still higher, variously 75 % and 90 %. States administer the program, subject to federal requirements imposed by the Medicaid Act, Medical Assistance regulations, 42 C.F.R. §§ 440.40(b), 441.50 et seq. and HCFA policy directives, such as the State Medicaid Manual.

29. In 1967, the Medicaid Act was amended to include the requirement that children receive EPSDT services. Through this Amendment, Congress intended to establish a unified, accessible, and accountable system of children's health care that would ensure that eligible children actually receive services necessary for healthy development. The Act includes a mandate that states provide or arrange for the provision of early and periodic screening services for eligible children. 42 U.S.C. §§ 1396a(a)(43), 1396d(a)(4)(B). In 1989, the Act was again amended to clarify that these screening services must

include four separate examinations: medical, vision, hearing, and dental. The medical examination must include a comprehensive health and developmental history (including an assessment of physical and mental health development), a comprehensive unclothed physical exam, appropriate immunizations, laboratory tests (including lead blood tests), health education, and anticipatory guidance. 42 U.S.C. § 1396d(r). Each of the four types of examinations must be delivered at periodic intervals that meet professional standards for children of different ages. 42 U.S.C. §§ 1396d(a), 1396d(r).

30. The 1989 amendment also required states to provide each eligible child with diagnostic and treatment services and other measures needed to correct or ameliorate defects and physical and mental illnesses and conditions, whether or not the needed service is otherwise covered by the state. 42 U.S.C. § 1396d(r)(5). In other words, the mandate of Medical Assistance does not stop with examining children and providing them with basic preventive care. It requires the states to follow-up and ensure that potential problems are diagnosed and treatment is provided promptly. The 1989 and 1990 Amendments also expanded eligibility, nearly doubling the number of children to be covered, by unhooking children's medical assistance from the receipt of public income assistance and substituting income eligibility criteria reaching to 185 % of poverty, thereby including children in virtually all families, working and not, with incomes below the poverty level and very many children in low-wage working families as well.

31. In addition, Medical Assistance recognizes that, for its requirements to have meaning, eligible children and their guardians must know that EPSDT services exist and must be provided to them. Thus, the Medical Assistance laws require states to use a combination of written and oral methods to:

(a) ensure that all eligible children and their families know of the services offered under Medical Assistance's EPSDT program;

(b) ensure that all eligible children and their families are offered transportation and appointment scheduling assistance prior to the due date of each child's periodic examination. 42 U.S.C. § 1396a(a)(43); 42 C.F.R. §§ 441.56, 441.62; HCFA, State Medicaid Manual § 5010;

(c) target outreach to certain "at risk" groups, including adolescents, those who have not recently used the Medical Assistance EPSDT program, and children in foster care placement. HCFA, State Medicaid Manual § 5121;

(d) effectively inform individuals who are blind, deaf or cannot read or understand the English language of the availability of EPSDT services. 42 C.F.R. § 441.56(a).

32. States are also obligated to ensure that there are enough healthcare providers who are willing and qualified to provide EPSDT services to meet the needs of children who are eligible for Medical Assistance. 42 C.F.R. § 441.61; HCFA, State Medicaid Manual § 5220. States must "take advantage of all resources available" to assure adequate provider participation in Medical Assistance's EPSDT services. HCFA, State Medicaid Manual § 5220. In this connection, states must ensure that payments under the plan are "sufficient to enlist enough providers so that care and services are available under the plan at least to the extent that such care and services are available to the general population in the geographic area." 42 U.S.C. § 1396a(a)(30)(A). States must also ensure that Medical Assistance is "furnished with reasonable promptness to all eligible individuals." 42 U.S.C. § 1396a(a)(8).

33. The Medicaid Act allows states to contract with "managed care organizations" ("MCOs") to provide services to

Medical Assistance beneficiaries. According to the Act, however, each MCO participating in Medical Assistance must have and maintain—and the Statue must assure that each does have and maintain—the capacity to serve its enrollment including that every managed care organization, offers the required services, including preventive and primary care services, to those enrolled including a "sufficient number, mix, and geographic distribution of providers of services." 42 U.S.C. § 1396u-2(b)(5).

34. The state's obligation also includes integrating the health care requirements with other agencies. To ensure an effective child health program, the state is required to coordinate its efforts to provide EPSDT services with other child-serving agencies, such as Head Start, WIC, Early Intervention Programs under the Disabilities Education Act, Title V programs for children with special health care needs, the public schools, public housing and Title XX social services programs. 42 U.S.C. § 1396a(a)(11); 42 C.F.R. § 441.61, State Medicaid Manual §§ 5230-5230.2.

35. To ensure that the goals of providing child healthcare are met, the Medicaid Act requires each State to meet specific performance targets, set by the Secretary of the Department of Health and Human Services. 42 U.S.C. § 1396d(r). The State must monitor its performance in providing EPSDT services, and must report annually and uniformly to the Secretary on the participation of children in the program and the State's results in attaining the participation goals set for the State. 42 U.S.C. § 1396a(a)(43)(D); HCFA State Medicaid Manual §§ 2700, 5360. The Secretary of Health and Human Services required the states to demonstrate that, by fiscal year (FY) 1995, 80% of the eligible children were receiving the medical examinations guaranteed by Medical Assistance's EPSDT program. HCFA, State Medicaid Manual § 5360 (Exhibit A).

36. Thus, Medical Assistance's EPSDT program stands as a broad directive that states that accept federal Medical Assistance subsidies must actively examine eligible children for medical, dental, developmental and mental health conditions on an ongoing basis, and must provide prompt and complete curative health care and rehabilitation services as needed.

The Michigan Medical Assistance Program

37. Michigan has participated in Medical Assistance since 1965. Federal law requires a state's Medical Assistance program cover certain groups of children, 42 U.S.C. § 1396a(a)(1)), and allows states to include certain optional groups of children. Id. Whether included as a mandatory or an optional group, the state's implementation of the Medical Assistance program must adhere to the requirements of federal law, including the provision of EPSDT services. 42 U.S.C. § 1396a. Currently, Michigan covers infants (under age one) with family incomes at or below 185% of the federal poverty level. The State has chosen to provide Medical Assistance eligibility up to 150% of the federal poverty level for children ages 1 through 16. Michigan also recently expanded Medical Assistance eligibility up to 150% of the federal poverty level for children ages 17 through 18. H.B. 5532. Approximately 800,000 Michigan children have enrolled in Medical Assistance—26.9% of all children in the State. HCFA, Form 2082 (FY 1996); Children's Defense Fund (1997) There may be many more children who are eligible for Medical Assistance but who are not enrolled.

38. Until 1997, Michigan operated its Medical Assistance program much like a commercial fee-for-services insurance plan. In 1997, Michigan applied for and obtained a waiver from the Secretary of Health and Human Services to allow the state to begin replacing its traditional Medical Assistance program with a "managed care" program. 42

U.S.C. § 1396n(b). This waiver, which is in effect from July 1, 1997 through June 30, 1999, requires the State to demonstrate that its Medical Assistance managed care program still assures that beneficiaries receive access to care and quality services.

39. The Michigan Medical Assistance managed care program has two main features that distinguish it from traditional Medical Assistance. First, the Medical Assistance beneficiary is required to enroll in a managed care organization (MCO); once enrolled, he or she must select providers who participate with that MCO. Second, the MCO receives a prepaid, fixed amount per beneficiary per month, referred to as a capitation payment, to provide all Medical Assistance services provided. From that allowance, the MCO pays the doctors and other healthcare providers who have contracted with the MCO to treat Medical Assistance beneficiaries. The MCO is at financial risk, meaning that it must absorb any losses that result if it cannot keep its beneficiaries' medical costs within its total amount of capitation revenues. Conversely, to the extent that the MCO reduces costs below the level of its capitation receipts, it gets to keep the difference (within certain limits).

40. The rights and responsibilities of participating MCOs and enrolled Medical Assistance beneficiaries are set forth in contracts between the MCO and the State and between the MCO and its participating "network" of providers. For example, the contracts list the package of benefits that the MCO is required to provide to Medical Assistance beneficiaries and which is covered by the state in the monthly capitated payment. Medical Assistance's EPSDT services, including outreach and transportation assistance, are included among the services for which the MCOs receive capitated payment.

41. By contracting with MCOs, Defendants do not relieve themselves of the ultimate responsibility of complying

with all federal laws related to Medical Assistance generally or Medical Assistance's EPSDT services specifically. At all times, the ultimate duty to ensure that all federally mandated services are provided remains with the State of Michigan and cannot be delegated or assigned.

42. Since the late 1980s, and particularly since 1995, the numbers of Medical Assistance beneficiaries in Michigan enrolled in managed care plans has increased. As of June 30, 1997, more than roughly 77% of Michigan's Medical Assistance beneficiaries were enrolled in managed care plans. HCFA, Medicaid Managed Care State Enrollment (last modified June 30, 1999) <http://www.hcfa.gov/medicaid/mcsten99.htm>. The vast majority of Medical Assistance beneficiaries under age 21 are enrolled in Michigan's managed care program.

43. The DCH failed to meet the 80% participation goal set by the Secretary of U.S. Department of Health and Human Services in 1995. Moreover, in every year thereafter, the participation percentage became even worse. The percentage of children who were supposed to be provided one or more comprehensive screening examinations who did receive at least one was as follows:

FY 1995: 47.0% of eligible children screened
FY 1996: 38.5% of eligible children screened
FY 1997: 35.3% of eligible children screened.

44. screening rates for older children are particularly low, and there is a downward trend in screening these age groups, as follows:

	6-14 years	15-20 years
FY 1995:	38% of eligible children screened	27% of eligible children screened

FY 1996:	31% of eligible children screened	21% of eligible children screened
FY 1997:	20% of eligible children screened	18% of eligible children screened

45. Put in another way, in FY 1997, 65% of the Michigan children enrolled in Medical Assistance—338,261 individual Michigan children did not receive any screening examination at all. Of these:

(a) 3,158 were infants who did not receive even one of the six required comprehensive screening examinations;

(b) 161,294 were toddlers—ages one through five—who did not receive a screening examination; and

(c) 174,209 were children ages 6 through 21 who did not receive a screening examination.

46. There is a similar downward trend in the number of children who are being referred for medically necessary corrective treatment through the EPSDT program, as follows:

FY 1995: 552 referrals
FY 1996: 754 referrals
FY 1997: 0 referrals

47. Michigan's record for dental assessments is similarly poor. Only about 25% of children who should receive dental assessments get them:

FY 1995: 227,739 dental assessments (27%)
FY 1996: 221,544 dental assessments (26%)
FY 1997: 200,120 dental assessments (25%)

48. The data listed above, which reports the percentage of eligible children screened, is found in a report provided to HCFA., known as a Form 416, the Annual EPSDT Participation Report. Beyond this information submitted to HCFA in the yearly Form 416, Defendants are unable to provide any details about the agency's compliance or non-compliance with the performance target rates established by HCFA.

49. Although the Annual EPSDT Participation Report for FY 1998 was due April 1, 1999, Michigan has not yet complied. It has filed only figures for the few children—approximately 20%--who are not in managed care.

V. CLAIMS FOR RELIEF

First Cause of Action

Denial of EPSDT Screening

50. Plaintiffs incorporate the allegations set forth in paragraphs 1 through 49, as though fully set forth herein.

51. The Medicaid Act, 42 U.S.C. § 1396a(a)(43) and 1396d(r)(1)(A) and (B), federal regulations, 42 C.F.R. § 441.57, and policy directives judicially recognized as having the force of law, including HCFA State Medicaid Manual § 5123, require Defendants to:

(a) Provide or arrange medical (developmental, physical and mental health) examinations for Plaintiffs;

(b) Provide lead blood level assessment including laboratory tests for Plaintiffs;

(c) Provide age-appropriate immunizations according to the schedule of the Advisory Committee on Immunization Practices;

(d) Provide "anticipatory guidance" for children and their caretakers as part of the basic child health care examination;

(e) Provide Plaintiffs with medical, vision, dental, and hearing examinations at periodic intervals, and, as deemed necessary by a healthcare professional, at "interperiodic" intervals (between scheduled visits);

(f) Prohibit insurance companies from requiring that eligible children and their adult caretakers receive prior

authorization for examinations, including interperiodic examinations, of eligible children;

(g) Submit annual reports that accurately tabulate and report the numbers of children receiving EPSDT services, by type of service.

52. In violation of 42 U.S.C. §§ 1396a(a)(43) and 1396d(r)(1)(A) and (B), Defendants have refused or failed to require their contractors to provide Plaintiffs with timely, adequate, and appropriate comprehensive examinations.

53. Defendants' violation of 42 U.S.C. §§ 1396a(a)(43) and 1396d(r)(1)(A) and (B) has caused and will cause Plaintiffs to suffer irreparable injury in that they have been, or will be, denied EPSDT services.

54. Defendants' violation of 42 U.S.C. § 1396a(a)(43) and 1396d(r)(1)(A) and (B) provides a cause of action to Plaintiffs under 42 U.S.C. § 1983, inasmuch as Defendants, under color of state law, custom, or usage, have deprived, are depriving, and will continue to deprive Plaintiffs of their clearly established rights under 42 U.S.C. §§ 1396a(a)(43) and 1396d(r)(1)(A) and(B).

55. Plaintiffs have no adequate remedy at law to prevent the continuing wrong and irreparable injury caused by Defendants' acts or omissions.

Second Cause of Action

Denial of EPSDT Treatment

56. Plaintiffs incorporate the allegations set forth in paragraphs I through 55, as though fully set forth herein.

57. The Medicaid Act, 42 U.S.C. § 1396d(r)(5), and federal regulations, 42 C.F.R. pt. 441, require Defendants to:

(a) Provide or arrange necessary health care, diagnostic services, treatment, and other measures to correct or ameliorate Plaintiffs' defects and physical and mental illnesses and conditions;

(b) Arrange for Plaintiffs' needed treatment directly or through a referral;

(c) Provide treatment for Plaintiffs' preexisting conditions identified during the comprehensive examinations;

(d) Provide necessary health care, diagnostic services, treatment, and other measures, whether or not such services are covered under Michigan's Medical Assistance program for adults;

(e) Assure that any prior authorization of necessary services is consistent with preventive care for Plaintiffs; and

(f) Provide basic child health care services, continuity of care, and necessary referrals of Plaintiffs.

58. In violation of 42 U.S.C. § 1396d(r)(5), Defendants have refused or failed to provide or ensure that the MCOs with which they contract provide Plaintiffs with the necessary health care, diagnosis services, treatment, and other

measures to correct or ameliorate their defects and physical and mental illnesses and conditions discovered by comprehensive examination services.

59. Defendants' violation of 42 U.S.C. § 1396d(r)(5) has caused and will cause Plaintiffs to suffer irreparable injury in that they have been, or will be, denied necessary health care, diagnosis services, treatment, and other measures to correct or ameliorate their defects and physical and mental illnesses and conditions.

60. Defendants' violation of 42 U.S.C. § 1396d(r)(5) provides a cause of action to Plaintiffs under 42 U.S.C. § 1983, inasmuch as Defendants, under color of state law, custom, or usage, have deprived, are depriving, and will continue to deprive Plaintiffs of their clearly established rights under 42 U.S.C. § 1396d(r)(5).

61. Plaintiffs have no adequate remedy at law to prevent the continuing wrong and irreparable injury caused by Defendants' acts or omissions.

Third Cause of Action

Denial of Basic Child Health Care Outreach and Information

64. Plaintiffs incorporate the allegations set forth in paragraphs 1 through 61, as though fully set forth herein.

65. The Medicaid Act, 42 U.S.C. § 1396a(a)(43), federal regulations, 42 C.F.R. § 441.56, and policy directives judicially recognized as having the force of law, including HCFA State Medicaid Manual § 5010, require Defendants to:

(a) Effectively inform Plaintiffs and their adult caretakers of the existence of the Medical Assistance EPSDT program;

(b) Effectively inform Plaintiffs and their adult caretakers about the availability of specific child health care services under the Medical Assistance EPSDT program;

(c) Effectively inform Plaintiffs and their adult caretakers of health resources and the benefits of preventive care through both oral and written activities that are aggressive and effective;

(d) Effectively inform Plaintiffs and their adult caretakers of information in clear and nontechnical terms, so that they know what services are available under the Medical Assistance EPSDT program, where these services are available, and how to obtain them;

(e) Effectively inform Plaintiffs and their adult caretakers of the availability of transportation and scheduling assistance to help them obtain EPSDT services;

(f) Monitor the provision and quality of services and ensure appropriate coordination of services received from different providers and agencies.

64. In violation of 42 U.S.C. § 1396a(a)(43), Defendants have refused or failed to effectively inform Plaintiffs and their caretakers of the existence of the Medical Assistance EPSDT program, the availability of specific child health care services, and related assistance.

65. Defendants' violation of 42 U.S.C. § 1396a(a)(43) has caused, and will cause, Plaintiffs to suffer irreparable injury in that they have been, or will be, denied information about access to EPSDT services.

66. Defendants' violation of 42 U.S.C. § 1396a(a)(43) provides a cause of action to Plaintiffs under 42

U.S.C. § 1983, inasmuch as Defendants, under color of state law, custom, or usage, have deprived, are depriving, and will continue to deprive, Plaintiffs of their clearly established rights under 42 U.S.C. § 1396a(a)(43).

Fourth Cause of Action

Failure to Provide Transportation and Scheduling Assistance

67. Plaintiffs incorporate the allegations set forth in paragraphs 1 through 66 as though fully set forth herein.

68. The Medicaid Act, 42 U.S.C. § 1396a(a)(43)(b), and federal regulations, 42 C.F.R. § 441.62, require Defendants to provide or arrange for the provision of EPSDT services by:

(a) Providing Plaintiffs and their adult caretakers with transportation assistance as needed to allow them to obtain EPSDT services; and

(b) Providing Plaintiffs and their adult caretakers with scheduling assistance as needed to allow them to obtain EPSDT services.

69. In violation of 42 U.S.C. § 1396a(a)(43)(b) and 42 C.F.R. § 441.62, Defendants refuse or fail to provide Plaintiffs with the transportation and scheduling assistance that is necessary to help them obtain EPSDT services.

70. Defendants' violation of 42 U.S.C. § 1386a(a)(43)(b) and 42 C.F.R. § 441.62 has caused, and will cause, Plaintiffs to suffer irreparable injury in that they have been, or will be, denied the necessary transportation and scheduling services which are necessary to allow them to receive EPSDT services.

71. Defendants' violation of 42 U.S.C. § 1396a(a)(43)(b) and 42 C.F.R. § 441.62 provides a cause of action to Plaintiffs under 42 U.S.C. § 1983, inasmuch as Defendants, under color of state law, custom, or usage, have deprived, are depriving, and will continue to deprive Plaintiffs of their clearly established rights under 42 U.S.C. § 1396a(a)(43)(b) and 42 C.F.R. § 441.62.

72. Plaintiffs have no adequate remedy at law to prevent the continuing wrong and irreparable injury caused by Defendants acts or omissions.

Fifth Cause of Action

Failure to Secure Capacity to Deliver the EPSDT Services Required by Title XIX

73. Plaintiffs incorporate the allegations set forth in paragraphs 1 through 72 as though fully set forth herein.

74. The Medicaid Act imposes upon Defendants a non-delegable duty to implement a Medical Assistance, "managed care" program that ensures that children who are eligible for Medical Assistance receive the health care services that they are entitled to receive under federal law. 42 U.S.C. §§ 1396(a)(8), 1396a(a)(30)(A) and 1396u-2(b)(5).

75. Defendants have violated this duty by developing and establishing a Medical Assistance Program which does not have the capacity, including but not limited to the financial capacity, necessary actually to deliver to all eligible Michigan children the quantity and quality of care required for children.

76. Defendants' violation of this duty provides a cause of action to Plaintiffs under 42 U.S.C. § 1983, inasmuch as Defendants, under color of state law, custom, or usage, have

deprived, are depriving, and will continue to deprive Plaintiffs of their clearly established rights.

77. Plaintiffs have no adequate remedy at law to prevent the continuing wrong and irreparable injury caused by Defendants' acts or omissions.

VI. REQUEST FOR RELIEF

WHEREFORE, Plaintiffs, on behalf of themselves and all others similarly situated, respectfully request that this Court grant the following relief:

1. Assert jurisdiction over this action.

2. Certify this action as a class action pursuant to Fed. R. Civ. P. 23 on behalf of the class defined above.

3. Grant declaratory relief pursuant to Fed. R. Civ. P. 57, declaring unlawful Defendants' policy and practice of denying Plaintiffs and the Plaintiff class the health care services to which they are entitled under the laws cited herein.

4. Issue injunctive relief pursuant to Fed. R. Civ. P. 65, prohibiting Defendants from violating the rights of the Plaintiff class as complained of herein and requiring them to take such actions as are necessary to remedy their past violations.

5. Appoint a Special Master pursuant to Fed. R. Civ. P. 53 to oversee Defendants' compliance with the Court's orders.

6. Award Plaintiffs reasonable attorneys' fees and costs, as authorized by 42 U.S.C. § 1988 and 28 U.S.C. 1920.

7. Grant such other relief as may be deemed proper by the Court.

Dated: July 12, 1999

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